

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1953

No. 62528

JAMES C. ROGERS, PETITIONER,

vs.

MISSOURI PACIFIC RAIROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MISSOURI

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PETITION FOR CERTIORARI FILED JANUARY 14, 1954

CERTIORARI GRANTED FEBRUARY 27, 1954

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**JAMES C. ROGERS, PETITIONER,**

*vs.*

**MISSOURI PACIFIC RAIROAD COMPANY**

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
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## INDEX

	Original	Print
Record from the Circuit Court of the City of St. Louis,		
State of Missouri .....	1	1
Petition .....	1	1
Answer .....	5	3
Trial .....	7	4
Appearances .....	7	5
Plaintiff's evidence:		
Testimony of James C. Rogers—		
Direct .....	8	5
Cross .....	56	16
Redirect .....	111	32
Further direct .....	178	33
Further recross .....	182	35
Further redirect .....	193	40
Further recross .....	194	41
Motion for directed verdict and denial thereof .....	195	42

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Record from the Circuit Court of the City of St. Louis,  
State of Missouri—Continued

Trial—Continued

Defendant's evidence:

Original      Print

Testimony of M. C. Galloway—

Direct	223	43
Cross	234	46
Redirect	241	50

Arnold McAllister—

Direct	243	51
Cross	249	54

E. L. Cook—

Direct	259	56
--------	-----	----

Leo Howdeshell—

Direct	283	59
Cross	302	70
Redirect	307	73
Recross	309	74
Further redirect	313	77
Further recross	317	80

Robert Leon Scratt—

Direct	324	84
Cross	330	88
Redirect	331	89
Recross	331	89
Further redirect	332	89

Ruling on motion for directed verdict	417	91
---------------------------------------	-----	----

Motion for directed verdict	417	91
-----------------------------	-----	----

Exceptions to instructions	419	92
----------------------------	-----	----

Instructions given	419	93
--------------------	-----	----

Instructions refused	425	96
----------------------	-----	----

Verdict	426	97
---------	-----	----

Judgment	426	97
----------	-----	----

Motion to set aside verdict and judgment and to enter judgment in accordance with defendant's motion for a directed verdict or, in the alternative, for a new trial	427	97
---	-----	----

Order overruling motion to set aside verdict, etc.	431	100
--	-----	-----

Notice of appeal	431	100
------------------	-----	-----

Clerk's certificate of mailing of notice of appeal (omitted in printing)	431	
--	-----	--

Order extending time to file transcript (omitted in printing)	432	100
---	-----	-----

Stipulation approving transcript (omitted in printing)	433	
--	-----	--

Reporter's certificate (omitted in printing)	434	
--	-----	--

# INDEX

iii

	Original	Print
Proceedings in the Supreme Court of the State of Missouri	437	101
Order assigning case to Division One	437	101
Argument and submission of case	437	101
Judgment	437	101
Opinion	439	102
Motion to modify opinion, motion for rehearing or, in the alternative, to transfer to the Court en banc (omitted in printing)	450	
Suggestions in opposition to motions for modification, for rehearing, or, in the alternative, to transfer to the Court en banc (omitted in printing)	471	
Order overruling motions for modification of opinion, for rehearing, or, in the alternative, to transfer to Court en banc	476	111
Motion to stay mandate and order staying mandate (omitted in printing)	477	
Clerk's certificate (omitted in printing)	479	
Order allowing certiorari	480	112
Order of substitution	481	



[fol. 1]

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,  
STATE OF MISSOURI**

PETITION—Filed May 27, 1953

Comes now plaintiff, James C. Rogers, and for his cause of action states to the Court:

1. That the jurisdiction of this Court is founded on the fact that this cause of action arises under the provisions of the Federal Employers' Liability Act (45 U.S.C.A., Sections 51-60).

2. That the defendant is now and at all times herein mentioned was the duly appointed, qualified acting trustee of the Missouri Pacific Railroad Company, a Corporation, under and by virtue of his appointment by order of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and was at all times hereinmentioned in charge of and operating all of the railroad properties, railroad system and lines, trains, engines and cars moved and operated by said Railroad Company, and in charge of the tracks, yards, and roadbeds over which said trains and cars were operated, and as such trustee of said railroad company, defendant was a common carrier of freight and passengers for hire, engaged in Interstate Commerce and transportation by railroad, and that said defendant now has, and at all times herein mentioned, had an office and place of business and is now [fol. 2] doing business in the City of St. Louis, State of Missouri.

3. That on the 17th day of July, 1951, and prior thereto, plaintiff was a servant in the employ of defendant in the capacity of a section gang laborer, earning approximately \$215.00 per month.

4. That a part of the plaintiff's duties was in furtherance of the Interstate Commerce Transportation business of the defendant and that by reason thereof, plaintiff and the defendant were at all times engaged in Interstate Commerce and then and there subject to the terms and provi-

sions of certain statutes of the United States of America, then and there in full force and effect, relating to the liability of Interstate Commerce carriers by railroad for injury to and death of their employees, which said statutes are commonly known as and referred to as the Federal Employers' Liability Act (45 U.S.C.A., sections 51-60).

5. That on the said 17th day of July, 1951 plaintiff, in the scope and course of his said employment for the defendant, was engaged in burning weeds using a hand torch along defendant's right-of-way, a short distance north of "Garner Crossing" in or near the City of Garner, State of Arkansas, and in so doing was required to work at a place in close proximity to defendant's railroad tracks, [fol. 3] whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger; that on the occasion herein mentioned a train did pass and did cause plaintiff to thus retreat and move quickly from the place where he was then working and to use as his place of work a part of defendant's said right-of-way adjoining its tracks that was covered with loose and sloping gravel which did not provide adequate or sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff states that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid.

6. That as a direct and proximate result, in whole or in part, of the negligence and carelessness of the defendant, as aforesaid, plaintiff was caused to sustain serious and permanent injury and damages in the following respects, to-wit: plaintiff's back, spine and neck and the [fol. 4] bones, joints, muscles, tendons, ligaments, cartilages, discs, tissues, membranes, nerves and vessels thereof, were bruised, contused, wrenched, sprained, strained, ruptured, displaced and prolapsed; that plaintiff sustained a severe nervous shock and his nerves and nervous system

were severely shocked and injured; that plaintiff has suffered, is suffering and will in the future continue to suffer from mental anguish and great bodily pain and disability in all of the aforesaid parts and organs, as well as in his right hip, right leg and right foot; that all of said injuries and the effects thereof are serious, permanent, painful and disabling, and the function and use of all of said parts and organs, as well as plaintiff's ability to work, earn and enjoy himself, have been seriously and permanently impaired, weakened, diminished and destroyed; and that as a direct result of said injuries, plaintiff has lost all of his said earnings, and will in the future continue to lose all, or the greater portion thereof, on direct account of said injuries.

Wherefore, plaintiff prays judgment against the defendant in the sum of Eighty-five thousand (\$85,000.00) Dollars, together with his costs herein.

[fol. 5] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

ANSWER—Filed June 26, 1953

Comes now the defendant, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, and for his answer to plaintiff's petition filed herein and to the various paragraphs thereof, in order, states the following, to-wit:

1. He admits the allegations contained in paragraph numbered 1 of plaintiff's petition.

2. He admits the allegations contained in paragraph numbered 2 of plaintiff's petition.

3. He admits that on the 17 day of July, 1951 and prior thereto plaintiff was employed by defendant in the capacity of a section gang laborer, but denies each and every other allegation contained in paragraph numbered 3 of plaintiff's petition.

4. He admits the allegations contained in paragraph numbered 4 of plaintiff's petition.

5. He denies the allegations contained in paragraph numbered 5 of plaintiff's petition.

6. He denies the allegations contained in paragraph numbered 6 of plaintiff's petition.

Further answering, defendant states that if plaintiff was injured on the occasion mentioned in his petition, which [fol. 6] defendant denies, his injuries were directly caused or contributed to by plaintiff's own carelessness and negligence in the following respects, to-wit:

A. He negligently and carelessly failed to keep a look-out ahead and laterally in the direction in which he was walking.

B. He negligently and carelessly failed to maintain and to secure proper footing for himself in the circumstances under which he was working and performing his duties at the time and place mentioned in plaintiff's petition.

C. He negligently and carelessly walked backwards or sideways without looking in the direction in which he was walking and without ascertaining for himself for his own safety that it was secure footing in the direction in which he was stepping or walking.

D. Plaintiff further states that the accident causing the plaintiff's injuries, if any, was the result of a negligent and careless misstep, slip and inattention on the part of plaintiff, and plaintiff was familiar with and knew the conditions under which he was required to work and the necessary structure of the ground upon which he was working, and failed to take proper care and precaution to protect himself from slipping or falling and failed to take proper care and [fol. 7] precaution for his own safety to obtain proper footing, both in standing and in walking in all directions and while in the performance of his duty.

Wherefore, having fully answered, defendant prays to be dismissed with his costs.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

**Trial**

The above entitled cause came on for trial on the 12th day of April, 1954, before the Honorable F. E. Williams,

Judge of the Circuit Court of the City of St. Louis, State of Missouri, presiding in Division thereof, sitting with a jury, and the following proceedings were then and there had:

#### APPEARANCES

Mark D. Eagleton, Esq., for Plaintiff.

Don B. Sommers, Esq., for Defendant.

A jury was duly empaneled and sworn to try the cause.

Mr. Eagleton made an opening statement on behalf of [fol. 8] the plaintiff.

Mr. Sommers made an opening statement on behalf of the defendant.

#### Plaintiff's Evidence

The plaintiff offered and introduced the following evidence:

JAMES C. ROGERS, of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Eagleton:

Q. Mr. Rogers, when you answer questions speak out as clearly as you can. Keep your voice up, because all the jurors must hear you, the court reporter, the Court and counsel. If for any reason you don't understand the question, indicate that and we will repeat it. What is your name?

A. James C. Rogers.

Q. Keep your voice up. How old are you?

A. Twenty-seven.

Q. Where do you live?

A. McRae, Arkansas.

[fol. 9] Q. Married man?

A. Yes, sir.

Q. You have one child, I believe?

A. Yes, sir.

Q. How long have you lived in McRae, Arkansas, or in that area?



A. I have lived there all my life with the exception of nine months I was in Michigan.

Q. Now, on July 17, 1951, I believe you were in the employ of the Missouri Pacific Railroad Company, being operated by its trustee, Mr. Thompson, on that day, were you?

A. Yes, sir.

Q. And had been employed by the company for some months previous to that?

A. Yes.

Q. In what capacity were you employed?

A. As section laborer.

Q. Who was your foreman?

A. Mr. Howdershell.

Q. Do you know how to spell his name?

A. H-o-w-d-e-r-s-h-e-l-l.

Q. Was he the same foreman you worked under all the time?

A. Yes.

Q. Were you in a section gang on July 17, 1951, at the [fol. 10] time your injury occurred?

A. Yes, sir.

Q. What time of the day did the accident happen?

A. Approximately eleven o'clock a.m.

Q. That is in the day time?

A. Yes.

Q. What type of day was it insofar as being clear or dry?

A. It was clear.

Q. Whereabouts were you working at the time?

A. I was working, well, at Garner, Arkansas, is where I started.

Q. Garner, Arkansas?

A. Yes.

Q. What particular work had been outlined to you by your foreman that morning before you were hurt? What were you doing?

A. I was firing weeds and vegetation on the shoulder of the road.

Q. Were any instructions given to you by him as to how far north you would go before you turned and went south?

A. Yes, sir; down as far as the section hands were putting in ties.

[fol. 11] Q. Is there a railroad crossing, a road crossing there at Garner?

A. Yes.

Q. At the time you were injured about how far north of that crossing were you?

A. Approximately two or two hundred fifty yards north from the crossing.

Q. North of the crossing?

A. Yes.

Q. Which way did your railroad tracks run?

A. North and south.

Q. How many tracks were there?

A. Two.

Q. Those tracks were commonly known as northbound and southbound mains. Is that right?

A. Yes, sir.

Q. There were no more; just the two tracks?

A. Yes. There was south of the crossing; starting a little bit north of the crossing and extending back south there is a spur track.

Q. Up where you were there were only two tracks?

A. Yes, sir.

Q. Is there a culvert located some short distance away from the point where you were injured?

[fol. 12] A. No, sir. It was at the place I was injured.

Q. It was at the place you were injured. This culvert that is there, how far is it away from this crossing, your crossing tracks?

A. It is approximately two hundred and fifty to three hundred yards.

Q. The crossing I am speaking of would be the crossing that runs in which direction?

A. East and west.

Q. Is that a public crossing?

A. Yes, sir.

Q. A grade crossing?

A. Yes, sir.

Q. That morning when you started to work at what time did you start work?

A. Started work at seven o'clock.

Q. You had been working approximately four hours?

A. Not at this place. We stopped between McRae and Garner and put in some ties, three or four or five ties—I don't remember—but a few ties that morning before we came down to this point.

Q. About what time was it when you got down to Garner?

A. I would say it was approximately ten-thirty.

Q. So you had only been at this place about a half an [fol. 13] hour before you got hurt?

A. Yes.

Q. What had you done in that half hour's time with reference to burning these weeds?

A. I had to move from the crossing north towards the culvert. I was firing the south main shoulder.

Q. You were firing the shoulder on the south main?

A. Yes, sir.

Q. That would be the shoulder that would be immediately west—

A. Yes.

Q. —of the west shoulder of the southbound track?

A. Yes, sir.

Q. And that shoulder there was about how wide?

A. Well, it was approximately three or three and a half feet wide.

Q. Was there, all during that distance as you came north from the Garner crossing, that is that east and west crossing, a flat surface upon which to walk?

Mr. Sommers: I object to further leading of the witness, your Honor. We have gone through the preliminaries on the thing. I think now the questions ought to be direct.

[fol. 14] The Court: All right. Make your questions more direct.

By Mr. Eagleton:

Q. As you came north firing these weeds, as you speak of it, on the west side, about how far would your body be, as you were moving north doing that work, away from the, we will say, the west edge of the ties which were underneath the southbound main?

A. I would be approximately two and a half or three feet.

Q. What was the surface, how was it composed, as you came along there with reference to whether it was flat or not flat or whatever the situation was?

A. It was flat.

Q. So that you had a flat surface to move north from the crossing. Is that right?

A. Yes, sir.

Q. Now, what sort of a device did you have to assist in igniting or burning or firing, as you call it, these weeds and vegetation?

A. I had a quart container with two spouts on it; one opposite right where you fill it up. On this container one spout had about a three-foot handle on one end of it; it runs back at about a forty-five degree angle. Opposite from that was the spout that had wicks on it, rags and stuff, [fol. 15] that made, you know, it was a flame where you light it. You light this and it has no pressure in it; it just flames and you stick it to the weeds.

Q. Did you use the word "quart"? Was it a quart container?

A. Yes.

Q. What was the container made of?

A. Tin.

Q. What was it filled with? A quart of what?

A. It was kerosene and gasoline—white gasoline mix that we used in the motorcar.

Q. Then had you ever done that work before at any time?

A. No, sir.

Q. Had you ever seen anybody attempt to fire weeds or vegetation with that sort of a device before?

A. No, sir.

Q. Normally and ordinarily how are the weeds fired or ignited?

A. They have a regular machine. It is a thing that has an engine on it; it pulls it by its own strength. It has irons that lead out on it. This fuel has pressure. They call them flame-throwers which does the shoulder burning.

Q. That is the way it was normally done?

A. Yes.

[fol. 16] Q. In that way tell the jury where the flame would be with reference to the men working with it. Would it always be behind or ahead or what?

A. It is more or less like the engine of a train. The man that operates it sits in there, you know, like an engineer and the fireman. The flame devices are on the back of it. The flame all comes out of the back of the machine. They are approximately fifteen or twenty yards ahead of the flame.

Q. The men are?

A. Yes.

Q. So the men in that position are never injured by the flames?

A. No, sir.

Q. On this particular occasion with this device, who gave you that device to work with?

A. The foreman, Mr. Howdershell.

Q. When did he give it to you? How long before this accident?

A. When we got off at Garner Crossing, when he told me to get off approximately thirty or forty-five minutes before I was hurt.

Q. Ordinarily what is that particular device used for, that particular hand device used for?

A. All I ever saw it used for was for burning a square, [fol. 17] but a surface to where when they unload these creosote cross ties, burn all the weeds and grass out so if there is any vegetation—these creosote ties catch fire easily, and they don't burn them up; they burn this spot out. That is away from the track.

Q. It is away from the tracks?

A. Yes.

Q. You never saw it used up near the tracks?

A. No, sir.

Q. When he gave you this device did he give you any instructions, orders or directions as to what he wanted you to do, how he wanted you to do it?

A. All he said, "Fire down around the path." In other words, there was a path that went over the two tracks. He said, "Fire down around on the west side and cross over on the east side and fire back to the crossing."



Q. Where would that path that crossed over be, from the west to the east side, with reference to this culvert?

A. It is approximately two hundred yards on further north than the culvert.

Q. Two hundred yards further north from the culvert?

A. Yes.

Q. The culvert we are talking about and the only one [fol. 18] we are talking about is the one where you were injured north of Garner crossing?

A. Yes.

Q. So that all the work you did up until the time you were injured was on the west side?

A. Yes.

Q. All of the work was proceeding in what direction?

A. North.

Q. Now, while you were doing that work how far had you gotten either way from the crossing, the Garner crossing—or how close had you gotten to the culvert before you heard any train coming?

A. I was approximately thirty or thirty-five yards from the culvert.

Q. From the culvert?

A. Yes.

Q. Which way were you from the culvert?

A. I was south of the culvert.

Q. So that you would have to go, to get to the culvert, just by way of making it clear, that much further to the north, thirty or thirty-five yards north to get to the culvert?

A. Yes.

Q. Which way was the train coming?

A. It came from the south going north on the east tracks.  
[fol. 19] Q. On the east track, which would be the north-bound track?

A. Yes.

Q. The track nearest to you would be the track farthest to the west—that is, the southbound track?

A. Yes, sir.

Q. How much space is there, approximately, if you recall, between the set of tracks?

A. Well, there is approximately, between the end of the ties there is approximately three feet.

Q. I am talking about between the two sets of tracks?

A. The two sets of tracks? There is approximately four feet or four and a half feet between them, the first two rails; I mean the two inside rails.

Q. Yes. Are we talking about the same thing? I want to know the distance between the northbound track, the two rails of the northbound track and the two rails of the southbound track.

A. Yes, sir. There is two rails to each track, what is called a "track". In the center, from one rail to the other, the two center rails, there is approximately four and a half feet distance between the two inside rails.

Q. There would probably have to be more than that for [fol. 20] cars to run on them?

A. No, sir. I am talking about from the end of the ties, Mr. Eagleton. I mean from the end of the ties the rails are setting on.

Q. Between the two ends of the ties there would be four and a half feet or some distance of that kind?

A. Yes.

Q. They were both set up at the same level, the tracks?

A. Yes.

Q. Were the tracks as far as the eye is concerned, practically level at that place?

A. Yes, sir. Coming from the north—I mean from south going north there was a little decline from the crossing or from south of the crossing towards the north it is lower as it goes down for a way. It is kind of downgrade.

Q. Did you receive any instructions from Mr. Howdershell, your foreman, as to what you should do at all times while a section man with reference to trains that go by?

A. Yes, sir.

Q. As to what duties you were to perform, what were you told to do by him?

A. He told us to put down everything we were doing, get clear of what we were doing and stand and watch the trains [fol. 21] go by for hot boxes.

Q. Had you always done that during the time you worked there as a section man?

A. Yes.

Q. What were you told by him, if anything, with reference to standing on the opposite track in doing that?

A. He said at all times he wanted some of men on one side of the track and some on the other.

Q. Some on one side and some on the other?

A. Yes.

Q. So they could see journals as they went by, hot boxes?

A. Yes, sir.

Q. With reference to standing on the track, between the rails of the track, what did he tell you about not doing that or doing that?

A. He said, "Don't stand even on the end of the ties or close to the other rail while there is a train on the opposite rail, because the interference, the sound of one train would deaden the sound of another one that possibly would come from the other way.

Q. He told you never to stand on that sort of track?

A. Yes. He said, "Always stand on the shoulder."

Q. Now, when you were doing this work on the west side [fol. 22] of the southbound main and moving from south to north with your torch igniting these weeds, you say you had gotten to a point about thirty or thirty-five yards away from the culvert to the north of you. Where were you standing then? Standing on the shoulder?

A. Yes, sir.

Q. And what was the first notice that you got of the fact that a train was coming?

A. When the train blew for the Garner crossing.

Q. How did you get that notice? I mean how did you learn of the fact?

A. I heard the whistle blown.

Q. Had you at any time prior to that been given any notification that the train would come or when it would come?

A. No, sir.

Q. What did you do when you heard this train whistle and knew it was coming to the north?

A. Well, I looked to see which track it was on.

Q. What did you see?

A. I saw that it was on the northbound rails, going north, so I quit firing. I ran on up about thirty or thirty-five

yards. When I came to about this point the engine had [fol. 23] passed me.

Q. The engine was at what end of the train? The north end of the train?

A. Yes; was at the north end of the train.

Q. Go ahead.

A. At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or any danger of the fire and it was time to start to watch these journals. So I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell.

Q. When you got on the culvert how far did you have to move while getting away from the flames and this fire which was in your face? How far did you have to move to get to this place where you slipped and fell?

A. Approximately six or eight feet.

Q. What direction would that be?

[fol. 24] A. That would be north from where I was standing.

Q. Where did that put you with reference to the culvert?

A. Up on the culvert.

Q. Was there any flat surface there at that time, of the culvert, for you to walk on?

A. No, sir.

Q. Are culverts a very frequent and, necessarily, a plentiful thing around railroads? You saw a lot of them?

A. Yes.

Q. In section work?

A. Yes.

Q. I will ask you what is the fact, normally do they have a flat surface upon which to walk across a culvert?

A. Yes, sir, they do.

Q. Did this one have one? Or was it one that was there and buried or covered up?

A. Apparently it had one, but they had neglected it, and the vibration from the train had shaken this incline—

Mr. Sommers: I am going to object to what he is assuming happened, your Honor.

The Court: Yes. Objection sustained.

By Mr. Eagleton:

Q. I don't want you to assume anything. When you [fol. 25] stepped on that portion of it, what was the effect it had on your feet—on that portion of the culvert where normally it is flat?

A. Nothing but crushed rock; no flat surface. It rolled out from under me.

Q. Is that what caused you to fall?

A. Yes.

Q. When you fell what did you fall on? How did you fall?

A. My feet slipped out from under me. I fell in kind of a jack knife position.

[fol. 26] Q. Normally when you were working there on the section crew and a train was to come by what would the foreman do with reference to notification as to time and so forth?

A. Yes, sir. He would tell us to work; he called the trains. We would work; we paid no attention to trains whatsoever. He said that was his job; we would work until he called "train". He would tell us, "There is one on north main", or "One on south main," and then we would work until he said, "Clear the track," or whatever we were doing, and some of us would take one shoulder and some the others. There was always someone on both sides watching the train go by.

Q. You say on this occasion you were not notified by anyone before you heard this whistle of the train yourself?

A. No, sir.

Q. Were you notified even afterwards?

A. No, sir.

[fol. 27] Q. When you heard the whistle and trotted this distance to the north and set your can down, you set it down where with reference to the shoulder or the ties?

A. I set it on the end of the ties.



Q. Where were your feet at that time with reference to the flat surface there? Were you on an incline or was it flat or were you up on the track or where were you?

A. I was standing on a flat surface with my torch setting on the end of the ties.

Q. Your torch would be which way from you? A little east?

A. It would be east of me, yes; northeast of me.

Q. It had a three-foot handle?

A. Yes.

Q. Did these weeds you were speaking about, which you were igniting, did they come all the way up to where you were standing and even to the back of you, to the west of you?

Mr. Sommers: I object to that question as being leading and suggestive.

The Court: I will sustain the objection.

Q. Will you tell me about the weeds that were there with [fols. 28-55] reference to where you were standing with this torch? Were there any weeds to the south of you?

A. Yes, sir.

Q. Were there weeds to the west of you?

A. Yes, sir.

Q. Were there weeds right up to this culvert?

A. Yes, sir.

Q. When these flames enveloped you, you say you turned around. Where was the flame, how close was it to your face when you turned and became conscious of the heat? How close was it to your face when you turned around?

A. It was right in my face; even singed my hair a little and my eyelashes.

Q. Where were the other men, the other members of the crew, working with reference to where you were then standing at that time?

A. They were approximately a hundred or a hundred and fifty yards further north, working on the east track.

[fol. 56] Cross-examination.

By Mr. Sommers:

Q. You mean you have never seen men firing a right-of-way by a handblower before?

A. No, sir.

Q. Never saw that in your life?

A. No.

Q. This torch just happened to be there for the purpose of burning off creosote ties?

A. No, sir. I don't know how it come to be there. It was on the motorcar.

Q. Did you say anything to Mr. Howdershell when he asked you to fire out there?

A. No, sir.

Q. Didn't say anything to the effect, "How about getting that machine down here?"

A. No, sir.

Q. Did you tell him you didn't know how to fire a right-of-way?

A. No, sir.

Q. You just went on ahead and did it?

[fol. 57] A. Yes, sir.

Q. You didn't say anything about there being a better way that morning? You just left it to him at the time?

A. No, sir; I done what I was told to.

Q. Didn't even ask him about it?

A. No, sir.

Q. Which way had you come to the job? From the south or from the north?

A. From the south.

Q. You got off where? Garner Crossing?

A. Yes.

Q. The other men were on up the way?

A. Yes.

Q. You were going to fire from Garner Crossing up to them?

A. Yes.

Q. You had been firing for about half an hour?

A. Yes, sir.

Q. With this torch?

A. Yes.

Q. You were getting along all right, were you?

A. Yes.

Q. You hadn't had any trouble firing along?

A. It was slow. At the crossing there was small bunches of grass that weren't very high; didn't burn very rapidly. [fol. 58] Q. You have to go from patch to patch to do your firings?

A. Just spots.

Q. You fire all the way up on the dump and down, don't you?

A. No, sir. They spray this with a chemical.

Q. What were you doing on that day, I am talking about?

A. I was firing where it had been spray. I mean they wouldn't burn only where they had been sprayed. I was firing weeds that had been sprayed, that were dead.

Q. They spray it with weed killer and you come along and burn those weeds off?

A. I did that day.

Q. That is all down in the dump, from the ties down to the top of the dump, isn't it?

A. No, sir. It don't hardly extend that far.

Q. How far does it extend?

A. It extends just over the shoulder, just over the incline a little bit, not too much, of the dirt dump.

Q. You mean to say you just burn from this path that you described, between the ties and that path? There is [fol. 59] gravel there, isn't there?

A. No, sir.

Q. There is not?

A. No.

Q. Where is the path?

A. It is between the shoulder, the corner of the road and the incline, where it starts, is a flat surface of dirt. Then there is an incline from there up to the end of the ties.

Q. What is that incline?

A. It is crushed rock.

Q. I think we are together there. We are using different words. So, from your right, as you would walk north there was crushed rock?

A. Yes.

Q. To your left the dump went down. Is that right?

A. Yes, but from the end of the crushed rock over to the dump there was three or four foot of flat surface there.

Q. The crushed rock is on top of the dump, isn't it?

A. Yes.

Q. On top of the crushed rock there are the ties?

A. Yes.

Q. And then you say there is this path next to the crushed rock?

A. Yes, sir.

[fol. 60] Q. And then to the left, if you were walking north, the dump goes down hill, doesn't it?

A. Yes.

Q. Is it downhill?

A. Yes.

Q. Where were you burning?

A. I was burning from the end of the ties, I mean from the end of the incline. The creosote that runs out of the ties keeps the weeds from growing there, from about half—

Q. Just a minute. If you are facing north, you have got on your right the crushed rock and the ties?

A. Yes.

Q. You are standing in this walkway, you say is there and you are burning off to the left, aren't you?

A. Yes.

Q. Don't you have to burn all the way down to the dump?

A. Not all the way, no, sir.

Q. How far an area from this path do you burn?

A. Approximately two and a half or three feet.

Q. You are burning a place about that wide, is all you are burning?

A. Well, where this spray extends over this dump and falls down on those lower weeds it does burn it down to the surface; I mean from the dump down it does, where [fol. 61] the chemical did get on the weeds it does burn off down the dump.

Q. By the way: when you stand up there you can turn and look up and down the track. You are that high, aren't you?

A. Yes.

Q. You heard this whistle blow. Is that right?

A. Yes.

Q. You looked, turned and looked south and saw the train coming?

A. Yes.

Q. With that you left your burning and went, ran thirty or forty yards ahead. Is that right?

A. Yes.

Q. You were already up on the dump then; you didn't have to climb the dump at that time?

A. No, sir. I was on the dump at all times.

Q. Up on top. So that train didn't take you by surprise, did it? You heard it coming?

A. Yes, sir, when it blew for the crossing.

Q. What is that?

A. When it blew for the crossing.

Q. You had time thereafter to go thirty or forty yards?

A. Yes.

Q. Ninety or a hundred feet?

A. Yes.

[fol. 62] Q. About twice the length of this courtroom?

A. Hardly that far.

Q. Well, it was about ninety or a hundred feet?

A. Yes.

Q. Whether it is twice the length of this courtroom or not. By the time you got to that point thirty or forty yards north of you, the engine was then passing you. Is that right?

A. Yes, sir; it had passed.

Q. So the fact Mr. Howdershell did not tell you this particular train was coming by didn't cause you any surprise, did it?

A. No, sir.

Q. All right. So far as that element of the case is concerned, you knew it was coming just as if Mr. Howdershell had told you?

A. Not as soon I wouldn't have, because he calls them when they come in sight.

Q. When they come in sight?

A. Yes.

Q. As far as this accident is concerned you had plenty of time thereafter before the train got to you?

A. Yes.

[fol. 63] Q. You went up to a point right next to the culvert, didn't you?

A. Yes.

Q. When you went up there you were thirty or forty yards away from the fire?

A. Yes.



Q. You could see the culvert?

A. Yes.

Q. You knew it was there?

A. Yes.

Q. You knew you were standing right next to that culvert?

A. Yes.

Q. There wasn't any trouble with that angle of it?

A. No, sir.

Q. As you stood there you watched the train go by?

A. Yes, sir.

Q. You felt some heat on your face?

A. Yes.

Q. You say you turned to the right. Is that right?

A. Yes.

Q. You had been facing east?

A. Yes, sir.

Q. You turned to the right and saw this fire?

A. Yes, sir.

Q. You say it was right up in your face?

A. Yes.

[fol. 64] Q. Did you ever tell anyone before today that your face was burned or your hair was singed or your eyebrows were singed, besides Mr. Eagleton, I mean?

A. I don't know as I told anyone, no.

Q. You never told me when I took your deposition.

Mr. Eagleton: You didn't ask him.

A. You didn't ask me.

By Mr. Sommers:

Q. I asked you what happened out there, didn't I?

A. I answered it the best I could. Your Honor, can I stand up a minute?

The Court: What?

The Witness: May I stand up just a minute?

(At this point the witness rose from his chair.)

By Mr. Sommers:

Q. I will ask you if when your deposition was taken, on page 31 Mr. Eagleton asked you this question: "Well, tell him what the thing"—are you listening?

The Court: He requested permission to stand for a moment.

The Witness: Thank you, sir.

Q. (By Mr. Sommers) (Reading)

"Q. Tell him what the thing is, tell him what you were [fol. 65] doing, the way you got there and how you got there."

That was Mr. Eagleton's question to you.

"A. All right. When this train came I heard the whistle blown, blow for the crossing. I stopped to see which way the train was, on which track it was on. It was on the north main going north. Well, I stopped firing and trotted out of the fire approximately thirty yards to get out of the danger of the fire. I stopped and set this torch up on the end of a tie where I wouldn't even catch anything else on first, and watched the train for hot boxes, and the next thing I knew—I mean the first thing I knew that hit me was the heat. The wind from this train blew this fire and these high weeds down on me. And that is just the way it happened."

"Q. What did you do when you felt the heat?" Mr. Eagleton asked you. "What did you do then when you felt the heat?"

"A. That's right.

"Q. What did you do?"

"A. I threw my hand up over my face like this and [fol. 66] started turning and getting away from it."

You didn't say anything even when Mr. Eagleton asked you, about the fire sing-ing your face?

Mr. Eagleton: He is telling what he did.

Mr. Sommers: Mr. Eagleton, you had your chance. Just give me mine.

The Court: One at a time.

By Mr. Sommers:

Q. You didn't say anything about it at that time, did you?

A. No, sir.

Q. Did you ever say anything about it to any of your doctors?

A. Not that I remember.

Q. So until today you have never before mentioned the fact that the——

A. (Interrupting) I could have mentioned it. I don't say I didn't.

Q. Do you recall, Mr. Rogers, at any time prior to today that you have told the section crew, your doctors or anyone else, me included, that the fire singed your eyebrows and your hair?

A. Well, you said "anyone else". My wife noticed it when I came in, when I came to the house. The best I recall, I don't remember for sure, but I believe Dr. Kinley [fol. 67] mentioned it and asked Mr. Howdershell what I was doing. He told him that I was firing and that is how come it, but I won't say for sure.

Q. Was Mr. Howdershell there with you in Dr. Kinley's office?

A. Yes.

Q. Then he would know about it?

A. Yes.

Q. Now, when the heat hit your face there you threw your arm up over your eyes like this?

A. Yes.

Q. You walked backwards, didn't you?

A. I turned to the south, to the west and to the north. I mean I was turning to the south, west and north as I was rapidly moving away.

Q. Well, you did walk backwards?

A. Yes, sir. I was walking backwards——

Q. You walked about three or four steps backwards?

A. Yes.

Q. All that time you had your hand over your face?

A. Yes.

Q. You knew at the time that you were going to walk across this gravel incline there?

A. No, sir. I had forgotten about it at that time.

[fol. 68] Q. Oh, you forgot about everything?

A. Yes.

Q. Did you even look to see where you were walking at that time?

A. No, sir. My face was full of smoke and everything; I just couldn't see at the time.

Q. When you slipped, you say the gravel slipped out from underneath you?

A. Yes.

Q. This is that portion of the gravel that is right up next to the ties, isn't it?

A. Yes, sir.

Q. There is gravel right up next to those ties everywhere along the railroad, isn't there?

A. Yes, sir.

Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it?

A. Yes.

Q. You have a dump and on top of that you put this gravel?

A. Yes, sir.

Q. They call it "ballast, don't they?

A. Yes.

Q. On top of that you lay the ties?

A. Yes.

[fols. 69-77] Q. And the rails. It was that ballast you were walking on at the time you slipped?

A. Yes.

Q. It was that ballast that slipped from under your feet, wasn't it?

A. Yes.

Q. When you slipped you fell to your buttocks, didn't you?

A. Yes, sir.

Q. Did I understand you awhile ago to say that you fell in a jack knife position?

A. Yes.

Q. Let me ask you this, Mr. Rogers: wasn't today the first time you ever told anyone in your life you fell in a jack knife position?

A. No, sir.

[fol. 78] By Mr. Sommers:

Q. Now, Mr. Rogers, to go back again: you say there is, alongside of the right-of-way, a path?

A. Yes, sir.

Q. And that path, what is the purpose of it?

A. It is a flat surface to walk on.

Q. And is it kept for that specific purpose?

A. Well, sir, that is what we use it for, what I used it for when I was working there.

Q. Who keeps it there?

A. Well the section gang; the railroad company.

Q. You were part of that section gang, were you?

A. Yes, sir.

Q. You say the section gang keeps a path there for themselves to walk on?

[fol. 79] A. It is there, yes, sir.

Q. On both sides of the right-of-way?

A. Yes, that's right.

Q. Every place on the railroad you have been?

A. No, sir, not every place.

Q. Well, all along the right-of-way on that section you worked on?

A. Yes; there is a flat surface of dirt other than where the culverts are.

Q. Other than where the culverts are?

A. Yes.

Q. So anytime you come to a culvert there isn't any. Is that right?

A. There is not a dirt, flat surface.

Q. At any culvert?

A. To a certain extent; I mean not like a shoulder is.

Q. That condition prevails throughout your entire section?

A. Yes, sir.

Q. This machine you said you had seen firing the right-of-way; I take it you are directing your testimony to the period of time in which you worked for the railroad. Is that right?

[fol. 80] A. No, sir. They didn't fire it while I was working with the flame throwers.

Q. You, in your experience on the railroad, have never seen them work with a flame thrower?

A. Not while I was working on the railroad, no, sir.



Q. So you don't know whether that thing was in use at that time or not, do you?

A. Pardon?

Q. You don't know whether that machine was in use at that time or not, do you?

A. I heard Mr. Howdershell say, the foreman—

Q. I am asking you if you know whether or not that machine was in use during the time you were on the railroad, or not?

A. No, sir, I don't know that it was in use.

Q. What kind of a machine did they use to kill these weeds with?

A. I don't know that. They spray it with some kind of a machine, some chemical that kills it, but I don't know what kind.

Q. Did you see them do it?

A. No, sir, I didn't.

Q. You have lived down there near McRae or there— [fols. 81-83] abouts all your life?

A. Yes.

Q. You have never seen any section crew firing with a handtorch?

A. No, sir.

Q. In your whole life?

A. No, sir.

Q. At the time you were firing along there what were the other men doing?

A. They were putting in ties on north main.

Q. That is heavy work, isn't it?

A. Yes.

Q. Why was it you were just firing while the others were doing the heavy work up there?

A. Because Mr. Howdershell assigned me to that job.

[fol. 84] Q. By the way: Generally when they do any burn-out there they burn the whole right-of-way, don't they?

A. Yes, sir; with those flame throwers that I have seen go through, do burn the whole right-of-way.

Q. How about during the time you worked there? You don't know when the flame throwers were there, do you?

A. No, sir.

Q. That is something a long distance past, isn't it?

A. They had sprayed the weeds for the flame thrower. If they wait a week or so after it is sprayed—

Q. Do you know of your own knowledge whether they sprayed it for the flame thrower or for something else?

A. All I know is what Mr. Howdershell said.

Q. I am talking about what you know.

A. No, sir; definitely I don't know.

Q. As far as this flame thrower, that is something that happened long before you ever came on the railroad. Is that right?

A. Yes, sir.

Q. So what they used at the time you were on the railroad was not the same as what was long before. Is that right?

A. That's right.

[fol. 85] Q. All right. Do you know what the section crew's duties were when the flame thrower was used?

A. No, sir.

Q. You don't know what the section crew's duties were when the flame throwers were used?

A. No.

Q. So, actually, when you say positively to Mr. Eagleton that the flame thrower was the way they always did it down there, you don't have any actual knowledge of that at all, do you?

A. Well, sir, that is what I have seen them do it with.

Q. You have just driven along and have seen the flame thrower out there on the highway?

A. Yes. I have stood and watched it pass through town.

Q. That was long before you went to work for the railroad?

A. Yes, sir.

Q. So far as the part the section crew took in that, you have no idea at all, do you?

A. No, sir.

Q. You were not on this particular day, the 17th of July, burning the whole right-of-way, were you?

A. I was burning the part of it that was sprayed, that [fol. 86] was dead, that would burn, yes, sir.

Q. You were just burning off the shoulder, weren't you?

A. Yes.

Q. Right up next to the ballast?

A. Yes, sir.

Q. You were only burning a place about this wide, weren't you (indicating)?

A. Approximately four or five feet wide, yes, sir.

Q. That would be dead grass and weeds that would catch fire from your torch?

A. Yes.

Q. You didn't have the whole right-of-way on fire, or anything like that?

A. No, sir.

Q. Now, Mr. Rogers, when you heard this train coming you looked and saw which way it was going, didn't you?

A. Yes, sir.

Q. You knew it was a northbound train?

A. Yes.

Q. You knew that there is wind that comes along after a train?

A. Yes, sir.

Q. You got ahead of that fire, didn't you?

A. Yes, sir.

Q. Why didn't you get behind your fire so the wind would pull it away from you?

A. I would have been standing in the fire. There was [fol. 87] fire on the shoulder all south of me.

Q. You didn't put the fire out as you went along there?

A. I set fire to the grass. I didn't put it out.

Q. You just let it burn?

A. Yes; I was in front of the fire.

Q. You kept in front of it all the way?

A. Yes.

Q. You knew when this train come along it was going to blow that fire, didn't you?

A. Sir?

Q. You knew when the train came along it was going to pass up that fire?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. You knew there would be a wind come along behind the train, though?

A. Yes.

Q. It would go along in the direction of the train?

A. Yes, but by being a track between me I didn't think the wind would affect it too much.

Q. You say it is only four and a half feet between those tracks?

A. That don't count the tracks. I mean between the two [fol. 88] tracks. That is not counting—

Q. How far were you actually from the train?

A. I was approximately fifteen or twenty feet west of the train; twenty-five feet, I would say. I don't know the exact distance across.

Q. You say Mr. Howdershell has always asked you fellows to watch for hot boxes on the trains?

A. Yes, sir.

Q. You say he said you should drop everything you are doing and watch for hot boxes?

A. Yes. He said when a train is passing to not be working; be watching the train.

Q. He never told you to completely ignore a fire that you set, in order to watch a train?

A. No, sir.

Q. You never thought that he meant anything like that, did you?

A. No, sir.

Q. You knew you had this fire going when the train was going by?

A. Yes, sir.

Q. That was your first duty, to watch that fire, wasn't it?

A. Well, what I did was to get on up far enough, I thought I would be out of the fire, to the best of my knowledge.

Q. I know that, Mr. Rogers. I appreciate that, but what [fol. 89] I am talking about is this: you didn't in any way interpret Mr. Howdershell's orders—

Mr. Eagleton: If the Court please, just a minute. Go ahead and finish your question.

Mr. Sommers: You don't put any such construction on Mr. Howdershell's orders so as to mean that you should ignore a fire which you had set, in order to watch for hot boxes?

Mr. Eagleton: If the Court please, I object to the form of the question as being two questions in one and it is repetition, and it is not what the witness said. In other words,

he has answered the question about what his duties were to watch the cars.

The Court: Your objection is sustained as to the two questions in one.

By Mr. Sommers:

Q. There wasn't any such construction put on Mr. Howdershell's orders that you should ignore the fire you set, was there?

A. Not that I know of, no, sir.

Q. And you knew on that day it was your duty to watch that fire?

A. Yes, sir.

Q. And that was the first duty, regardless of the train?  
[fol. 90] A. He told us to watch the train when it came by.

The Court: Answer the question yes or no and then you may explain.

Mr. Eagleton: If the Court please, I don't think that is fair to the witness, to ask him what his first duty is or his second duty is or which is paramount. He was told to watch the train and he said he had to do both at the same time.

Mr. Sommers: Oh, now——

The Court: The witness may answer the question the best he can.

By Mr. Sommers:

Q. You knew that was your primary duty, to watch that fire, didn't you?

A. Yes, sir. I was to fire the weeds and vegetation.

Q. Now, Mr. Rogers, when you fell you were on this incline, you say?

A. Yes, sir.

Q. And that is the ballast right up next to the ties. Is that right?

A. Yes.

Q. Did you slide on down? What did you do after that?

A. The first thing I did, my feet slid out from under me. [fols. 91-96] As I was turning I tried to stay straight with the flat surface. When I came in on this incline my feet slid out from under me. When my feet started to slide I leaned forward to balance myself. Then I fell——



Q. You say your feet slipped out this way (indicating)?

A. Yes, sir.

Q. And at the same time you leaned forward?

A. Yes, sir.

Q. Your back didn't go back at all?

A. Yes, sir. Let me finish, please, sir. When I sit in a sitting position on this incline, I also slid. My seat slid on the same as my feet; that turned me on my back.

Q. Your feet went out from underneath you; you fell down on your fanny and then rocked on back?

A. Yes.

Q. That is the way it happened?

A. Yes.

Q. After that what happened?

A. Well, the next thing I remember I was in the bottom of the water drainage.

Q. Did you fall down in the bottom of the water drainage?

A. Well, as far as I know I slid on down in the water drainage.

[fol. 97] Q. When you were standing waiting for this train to go by you had your can on the edge of the tie, did you not?

A. Yes.

Q. You had hold of one handle of it?

A. Yes.

Q. How long is that handle?

A. Approximately three or three and a half feet.

Q. So you were right up next to the ties yourself, within three feet of them?

A. Yes, sir; the length of my arm and the three feet.

Q. The length of your arm and the three feet?

A. Yes.

Q. Were you standing on any gravel at that time?

A. No, sir. I was standing on the flat surface.

Q. Then you must have backed up on the gravel when you backed up. Is that right?

A. Yes, sir, I must have.

Q. You did, Mr. Rogers, at the time, if you were facing—let's see. You were facing east watching this train go by like this, weren't you?

A. Yes.

Q. You had hold of the can with your right hand?

[fols. 98-110] A. Yes.

Q. Standing here like this watching that train go by?

A. Yes.

Q. And you did turn like this, with your arm over your face, and walked backwards?

A. Yes.

Q. You had your arm over your face all that time?

A. Yes, sir. I turned south and west as I was backing away.

Q. You walked about three or four steps backward with your arm over your face?

A. About three or four.

Q. That would be approximate?

A. Yes.

Q. With your arm over your face all that time.

(No response by witness.)

[fol. 111] Redirect examination.

By Mr. Eagleton:

[fol. 112] Q. Now, when you were at the place where you  
[fol. 113] started after you heard this engine coming, how did you go to the place about thirty yards north of there? Did you walk or run?

A. I was running.

Q. When you got there you say the engine was already going by?

A. Yes.

Q. Were you on a path?

A. Yes.

Q. And that path would be about how wide?

A. Approximately three or three and a half feet wide.

Q. Is there a path normally provided across the culvert, right contiguous with that path?

A. Yes.

Q. How wide is the path across the culvert?

A. Approximately the same width.

Q. Two and a half or three feet wide?

A. Yes.

Q. Did you use that path on the culvert as you went north to get away from this fire?

A. Yes.

Q. On that day what was it covered with?

A. Loose rock, crushed gravel.

[fols. 114-177] Q. What were the instructions to the section gang with reference to permitting or allowing loose rock to be on that path across the culvert?

A. When there is loose rocks, any time we take out a tie or anything and move the rocks from the incline, he would have us to clean it out and put them back where they were so the men would have a safe place to walk.

Q. Who told you that?

A. The foreman.

Q. Mr. Howdershell?

A. Yes.

Q. And that is the very place you were on; it was sloping and an incline instead of being level at that point?

A. Yes, sir.

[fols. 178-179] JAMES C. ROGERS, having been heretofore duly sworn, testified further as follows:

Further direct examination.

By Mr. Eagleton:

[fol. 180] Q. Now, one other thing I wanted to get. At the time you came up from the place where you had been burning the leaves or weeds when you heard this train and you went up to this spot towards the culvert; I believe you say you *ran* up there?

A. Yes, sir.

Q. When you ran up there what did you do as soon as you got far enough away that you thought you were safe from the fire? What did you do?

Mr. Sommers: I object to the leading and suggestive question, your Honor and statements by counsel. I further object because this is repetition.

The Court: Part of the question is objectionable.

By Mr. Eagleton:

Q. What did you do as soon as you got up to the point thirty or thirty-five yards from the fire?

A. I turned my body east and watched the train go by.

Q. At that time, I believe, you said that the engine had gone by. Where was the first car attached to the [fol. 181] engine.

A. It was even——

Q. About even with you?

A. Yes.

Q. How long was it you were in that position before you felt this flame or the burning process, how many cars had gone by?

A. Approximately three or four.

Q. About how fast would you say that train was moving?

A. I would say thirty-five or forty miles an hour. It was a rapid speed.

Q. Had you, when you went up there, made any survey of the situation that was north of there or the culvert, at that time?

A. No, sir, I hadn't.

Q. Did you know at that time or did you see at any time before you got hurt, that culvert was covered over with a sloping substance of rock and gravel?

A. No, sir, I didn't.

Q. Had you ever seen a culvert covered in that manner, sloping in that manner before?

A. No, sir.

Q. When was the first time you knew it was covered in that manner and sloping in that manner?

[fol. 182] A. When I backed in on it and started falling.

Q. The level portion of the culvert you spoke about, that is normally two and a half feet wide and made of concrete, to what extent was it covered with this sloping down rock and gravel from the ties?

A. It was all covered.

Q. Practically all covered?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

Further recross examination.

By Mr. Sommers:

Q. How long is this section you worked on down there?

A. Sir?

Q. How long is the section?

A. In miles?

Q. Yes.

A. I don't really know.

Q. You were working on that—when did you go to work? Was it about May 21st or somewhere around there?

A. It was in May. I don't remember—

Q. Somewhere in the last two weeks of May?

A. I don't remember. We moved to town in May; I remember that. That is when I started working there.

[fol. 183] Q. Here is your application and the date on there is 5-17-51. Is that right?

A. Yes, sir.

Q. That is the day you filled it out and signed it?

A. I didn't fill it out.

Q. Had it filled out and signed it?

A. Yes, sir.

Q. You didn't go to work on that same day, did you?

A. No, sir. It was filled out at night.

Q. Down here is a section that says you were employed on 5-21-51. Would that be about right?

A. Yes.

Q. So you went to work about on the 21st of May?

A. Yes.

Q. Mr. Rogers, between the 21st and the 12th of May, at least, you had worked all up and down that section, had you?

A. Repeat that, please.

Q. Between the 21st of May and the 12th of July you had worked all up and down that section on various things, hadn't you?

A. Yes, sir.

Q. You say that you had never seen this culvert or any culvert like it?

[fol. 184] A. I had seen the culvert; but I hadn't noticed that it was covered over by this loose rock.



Q. What was this loose rock up there for?

A. Well, it was the incline that is supposed to have been up at the end of the ties.

Q. Well, wasn't it up there?

A. Yes, sir, but it had shaken down and covered—the vibration from the trains had shook it down off the end of this culvert and made a sloping incline.

Q. How much difference is there from the west rail of the west track to the end of that culvert, would you say?

A. I would say approximately five feet.

Q. Five feet?

A. Five or six feet.

Q. Five or six feet. All right. So, there is five or six feet that you would have to cross over that culvert without walking on the rails. Is that right?

A. Yes, sir.

Q. Being outside of the tracks. You had five or six feet?

A. Yes.

Q. You say that was gravel in there, five or six feet?

A. No, sir, not all the five or six feet isn't gravel.

Q. Well, describe it.

[fol. 185] A. Sir?

Q. Describe it.

A. There is a flat surface of dirt on the shoulder of the road.

Q. What about the culvert now? Is there a flat surface over the culvert?

A. On most culverts, yes, sir.

Q. How about on this culvert?

A. No, sir, there wasn't.

Q. I am talking about this culvert. Will you describe what was there on that culvert?

A. Yes, sir. There was the rails, the ties, and then this incline.

Q. That incline is the built-up ballast that holds the ties and the rails in place, is that correct, or upon which the ties and rails are placed?

A. Yes, sir.

Q. That is there for a proper purpose, is it?

A. Yes, sir, as far as I know.

Q. That incline, is that what you slipped on?

A. Yes, sir, it is.

Q. So that you had backed up onto that incline when you slipped?

A. No, sir. I had backed due north from where I was standing on the flat surface. I didn't back up east, next [fol. 186] to the rails.

Q. How long is this incline?

A. Well, from the end of the ties it is approximately three feet, is all, from the end of the ties.

Q. Was there two or three feet more on the culvert there that was not incline?

A. No, sir. The rocks had fallen down and had covered it over.

Mr. Eagleton: (Q.) Covered over what?

The Witness: Sir?

Mr. Eagleton: Covered over what? The flat surface?

The Witness: Yes, sir. It covered over the flat surface.

By Mr. Sommers:

Q. That is what I am getting at. There was a flat surface up there, you say?

A. Yes, there is a flat surface. I mean the bridge is built flat.

Q. The bridge is built flat?

A. Yes.

Q. Then you have got about three feet of flat surface and then about three feet of incline?

A. No, sir, you don't have that much.

Q. Didn't you say there was five or six feet of it [fol. 187] there?

A. From the rail; the ties then stick out from the rail a ways.

Q. How far do the ties stick out?

A. Approximately a foot or foot and a half; I don't know just how far. They do stick out a ways.

Q. Was there any flat surface at all—I am not trying to argue with you—I just want to get it straight.

Mr. Eagleton: You mean on the culvert?

Mr. Sommers: I am talking about on this culvert.

By Mr. Sommers:

Q. I thought you testified a minute ago there was about six feet from the rails.

A. Yes.

Q. Before you got to the end of the culvert?

A. Yes.

Q. I thought you testified—you can correct me if I am wrong, because I am not trying to argue with you—I thought you testified that it was all covered with gravel, that six feet. Is that right?

A. Yes, sir, it was.

Q. But that part of it was a flat surface?

A. The flat surface was also covered.

[fol. 188] Q. That is what I am getting at. It was covered, but it was a flat surface there?

A. No, sir. It was covered, and from the ties above being higher, the rocks shaking down, moving down, had caused an incline of about thirty-five feet.

Q. Then it was all incline?

A. Yes, sir.

Q. That is what I am trying to get at. At this particular point on this culvert you were on the incline when you slipped and fell?

A. Yes.

Q. It was all incline; there wasn't any flat surface there?

A. No.

[fol. 189] Q. By the way; hadn't you actually worked around this culvert, this very culvert, cleaning out the waterway there while you were on that section gang?

A. Yes. I was clearing out the water drainage on down [fol. 190] below the highway and the railroad dump. The highway is west of the railroad.

Q. Well, I am talking about this particular culvert. That culvert is to carry water, isn't it, under the right-of-way?

A. Yes, sir.

Q. So that this dump would kind of form a dam so far as water is concerned, wouldn't it?

A. No, sir. It has openings in it.

Q. This culvert?

A. Yes; underneath.

Q. That is the purpose of it, so that the dump won't dam up surface water?

A. Yes, sir.

Q. So far as this particular culvert was concerned hadn't you worked around there with Seratt and the other boys, cleaning that out, keeping it free for the water passage?

A. At one time, yes, sir. I helped cut grass down in the bottom between the railroad, but not upon the shoulder or right at the immediate place of the bridge or of the culvert.

Q. Well, if you would stand down at the bottom of the culvert it would only come about this high, wouldn't it?

[fol. 191] A. Approximately three and a half or four feet high.

Q. So if you were working down here this thing was right in your face, wasn't it?

A. No, sir. I didn't work right up to the culvert. We worked in teams, cutting each way. There was two of us with briar scythes or weed cutters and we started at one place, I mean we was stationed all along cutting this grass out. I did help cut it, but not right at the culvert.

Q. You knew that culvert was there?

A. Yes; I had noticed it was there.

Q. You knew it was there when you ran up to it that day? You knew it was there when you ran up to it that day?

A. Yes, I noticed it because I was running north.

Q. You knew you had run right up close to it?

A. Yes, sir. At the time I knew that the culvert was there, at that time.

Q. And so far as that is concerned the culvert wasn't any mystery to you, was it?

A. No, sir. I paid no attention to the culvert when I [fol. 192] got there. The train had already overtaken me at that point.

Q. Well, from your other experiences on the railroad you knew what that culvert looked like—I mean from your other experiences of working around down there and right over that culvert, you knew all about that culvert?

A. No, sir, I didn't know all about it.

Q. Did anybody come running up to you after the accident, Mr. Rogers?

A. At the point that I reached back up on the dump—

Q. That was about ten yards north of the culvert?

A. Some ways north, yes, sir.

Q. Did anybody come up there to you?

A. It seems to me they did; I am not sure. I mean at that point I don't remember exactly what happened, but I do remember of seeing someone shortly after that and asking for a drink of water. I am almost sure someone came to me at that point, but I wouldn't say for sure.

Q. Do you know of any witnesses to this accident?

A. No, sir, I don't.

Q. No one has ever told you they saw you fall or anything like that?

[fol. 193] A. No, sir, they haven't.

Mr. Sommers: That's all.

Further redirect examination.

By Mr. Eagleton:

Q. Mr. Rogers, without belaboring this thing, Mr. Sommers asked you if the ballast was placed there for a proper purpose under the ties, and so forth. Was the ballast that was placed under the ties, was that ballast supposed to be kept off the flat surface of this culvert?

A. Yes, sir, it was supposed to be.

Q. Did you know it was covered with that stuff, on that incline, before you got hurt?

A. No, sir, I didn't.

Mr. Sommers: You were standing right next to it?

The Witness: Yes.

By Mr. Eagleton:

Q. When you turned your head and put your hand over your face, why did you turn your head and why did you put your hand over your face?

A. When I felt the heat of the fire I turned facing it, backing away, and I put my arm over my face to keep the fire from burning me.

[fol. 194] Mr. Eagleton: That's all.



Further recross examination.

By Mr. Sommers;

Q. You say the fire was clear up as high, as tall as you are. Is that right?

A. Yes; at times it was.

Q. Particularly at this time?

A. Yes, at this point.

Q. Was it really the fire, Mr. Rogers, or the smoke that got into your eyes?

A. It was the fire and smoke both. I mean the fire was right on me.

Q. These weeds you were burning wouldn't be over knee high, would they?

A. Yes, there is places they were shoulder high.

Q. They already had been killed off?

A. Yes. Where I started, at the crossing, they were small; just small bunches of small stuff. Further down this lower part that I came towards, this water drainage, the vegetation was higher.

Q. Was it any thicker?

A. Yes; thicker.

Mr. Sommers: All right. That's all.

[fol. 195] Mr. Eagleton: That is all. Plaintiff will rest, if the Court please.

(The following proceedings were had outside the hearing of the jury.)

Mr. Sommers I would like to file this and be heard on it, if I may (Handing paper to the Court). Maybe we could take our morning recess a little bit early, because I have got to call up, I have got some exhibits that I have neglected to bring with me and I would like to call my office and have them brought over here before we proceed.

The Court: We will have our morning recess at this time.

(At this point there was a recess.)

**MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S  
CASE—Filed April 14, 1954**

Comes now Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, the defendant herein, and at the close of all the evidence offered on behalf of the plaintiff herein, moves the Court to direct a verdict in favor of the defendant for the following reasons:

1. Under the law, the pleadings, and the evidence there [fol. 196] is no submissible jury issue in the case and, under the law and the pleadings, the evidence is not sufficient to make a jury issue or a jury question;

2. Under the law and the pleadings, the evidence on behalf of plaintiff does not give rise to a cause of action against this defendant;

3. The evidence does not raise a question of fact as to any negligent act or omission on the part of this defendant, his agents, servants or employees;

4. The evidence of the plaintiff affirmatively establishes that there was no act of negligence on the part of this defendant, his agents, his servants or his employees;

5. The evidence on behalf of plaintiff fails to establish any act of negligence on the part of this defendant, his agents, servants or employees which caused or contributed to cause plaintiff's injuries, if any;

6. The evidence on behalf of plaintiff affirmatively establishes that there was no act of negligence on behalf of defendant, his agents, servants or employees, particularly no act of negligence as pleaded in plaintiff's petition, which caused or contributed to cause plaintiff's injuries, if any;

7. The plaintiff has failed to sustain the burden of [fol. 197] proof of the issues raised in his petition;

8. Under the law, the pleadings and the evidence, the defendant is entitled to a directed verdict in his favor.

(Filed April 14, 1954.)

Defendant's Motion for Directed Verdict at Close of Plaintiff's Case was by the Court Overruled.

[fols. 198-222] DEFENDANT'S EVIDENCE

The defendant offered and introduced the following evidence:

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[fols. 223-228] M. C. GALLOWAY, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Sommers:

Q. Tell the jury your name, please.

A. M. C. Galloway.

Q. Where do you live?

A. Seven miles from McRae.

Q. Out in the country?

A. Yes, sir.

Q. Down in Arkansas, McRae, Arkansas?

A. Yes, sir.

Q. What do you do for a living?

A. Work on the section at McRae.

Q. Is that Section 20?

A. Yes, sir.

Q. Is that the section Mr. Howdeshell is foreman of?

A. Yes, sir.

Q. How long have you worked on the section?

A. Since the 12th of March in '51.

Q. The 12th of March, 1951?

A. Yes, sir.

Q. Do you know Mr. James C. Rogers who is the plaintiff in this lawsuit?

A. Yes, sir.

. . . . .

[fol. 229] Q. Has he ever told you about what happened on the 17th of July down there?

A. No, sir.

Q. Do you remember what he was doing the last day that he worked?

A. Yes, sir.

Q. What was he doing?

A. He was burying the right-of-way, the shoulder from the crossing north.

Q. He was burying the shoulders. What were the rest of you fellows doing?

A. Putting in ties.

Q. On north of him?

A. Yes, sir.

Q. Did Mr. Rogers later leave the job that morning?

A. Yes, sir.

Q. When was the first you knew, that is, knew anything—well, wait a minute. What happened there that morning concerning Mr. Rogers?

Mr. Eagleton: Talking about July 17th?

Mr. Sommers: On the last day he worked down there.

A. Well, he was up in the motor car when the foreman [fol. 230] come and hollered to help load the car.

Q. He was up at the motor car?

A. Yes. We all gathered to load the car and decided to go down to the tie yard to get Jeff Clohr.

The Court: We are not railroad people. You will have to speak out so we can understand these things.

By Mr. Sommers:

Q. Did he at any time tell you then that morning that he had fallen on the right-of-way?

A. No, sir.

Q. Has he ever told you that since?

A. No, sir.

Q. When you were up there was he able to talk?

A. Yes, sir.

Q. He did talk, or did he talk?

A. Yes, sir.

Q. Did he at that time appear to be dazed?

A. No, sir.

Q. Or that he had taken leave of his senses in any way?

A. No, sir.

Q. He didn't say anything to any of you about slipping and falling. Is that right?

A. No, sir.

Mr. Eagleton: I object to that—  
The Court: Objection sustained.

By Mr. Sommers:

Q. Mr. Galloway, I will ask you this: Have you burned [fol. 231] grass on the right-of-way?

A. Yes.

Q. How do you do it?

A. With a hand torch.

Q. You heard Mr. Rogers describe this fire machine they use?

A. Yes, sir.

Q. Has that been used while you were on the railroad?

A. No, sir.

Q. What is it used for now?

A. It is converted into a spray machine.

Q. Just used to spray?

A. Yes.

Q. At any time have you even seen a fire machine used on the railroad?

A. No, sir.

Q. I will ask you, Mr. Galloway, if there are any paths along the railroad right-of-way anywhere that you have seen?

A. No, sir.

Q. That men walk on?

A. No, sir.

Q. Have you ever as section man, as part of the crew down there, been assigned to shovel up gravel and make a path?

A. No, sir.

Q. How about over culverts: Did you ever see a path over a culvert?

A. No, sir.

Q. Where do you men walk when you want to walk some place?

A. If there happens to be a wide enough place on the shoulder, we walk on the shoulder. If not, and no train is [fols. 232-233] coming, we walk in the middle of the track.

Q. Do you ever get down off the dump and walk?



A. I have.

Q. After Mr. Rogers left that day what did the rest of you do?

A. We put in a few more ties and put plates on the new ties and spiked them up.

Q. Did Mr. Howdeshell go with Rogers?

A. Yes.

Q. After Mr. Howdeshell came back—well, withdraw that. Did you ever see where Mr. Rogers' torch was?

A. Yes, sir.

Q. Where was it?

A. It was approximately three hundred or four hundred feet from the culvert.

Q. Which way from the culvert?

A. North.

Q. It was north of the culvert three or four hundred feet?

A. Yes.

Q. Where was it—I mean with reference to the track?

A. Laying on the shoulder.

Q. Laying on the shoulder. Had the grass been burned there?

A. Yes, sir.

Q. Was it burnt up to where the torch was lying?

A. Yes, sir.

[fols. 234-235] Cross-examination.

By Mr. Eagleton:

[fol. 236] Q. This matter of walking on the shoulder: Don't you always walk on the shoulder of the road, the railway, either side of the railroad tracks, whenever you can?

A. If there happens to be a decent place to walk there, I do. Otherwise, I don't if it is sloping.

Q. That is where you walk whenever your work requires you to walk: On the shoulder?

A. That's right.

Q. You don't walk up on the ties if you can avoid it? .

A. Not if there is a better place to walk.

Q. With a train going by, have you received instructions that when one train is passing, never to get on the other track, because the noise of the one train may keep you from hearing it and be in danger?

A. Yes.

Q. You receive those instructions?

A. Yes.

Q. Was there a worn path both north and south of this culvert on July 17th, 1951?

A. Not that I remember.

Q. Did you go down and look at it after he was hurt?

A. I have passed by there.

Q. Did you make any particular inspection of the culvert after he was hurt so you would know whether there was or not?

A. No, I didn't.

[fol. 237] Q. Did you go down to the culvert after he was hurt?

A. Just walked by there one day.

Q. I mean right after he was hurt. You say this torch—

Mr. Sommers: The same day?

Mr. Eagleton: The same day.

A. No, I didn't, the same day.

By Mr. Eagleton:

Q. You didn't note of the fact his torch was three hundred feet north of the culvert, did you? Did you take note of it that day?

A. Yes, sir. I noticed when they picked it up.

Q. You made a note in your own mind. That torch was nothing that was new to you, was it? In other words, it was a thing you have always used there in your time?

A. Yes.

Q. You not only noted the fact that they picked up the torch, but you noted the place where they picked it up?

A. I don't know the exact place. I said approximately from three to four hundred feet.

Q. I don't mean the exact place. It might have been two hundred and ninety-nine or three hundred and fifty-one, but you were making, on July 17th, 1951, after this man was injured and after he had been taken by the foreman to Beebe in this station wagon, you made a note of the exact place or the approximate place, we will put it, that [fol. 238] they were picking up this torch, were you?

A. Well, I suppose.

Q. Why were you making that note? Why were you interested in how many feet it was north of the culvert?

A. Well, I wasn't particularly interested at that time.

Q. You were interested enough to make a note of it?

A. Well, I happen to remember it.

Q. Can you remember any other detail? You didn't think the man was injured in connection with the torch at that time, did you?

A. No, sir.

Q. And notwithstanding the fact he was not injured with it, you saw the torch there and you made a note of that one incident. Is that right?

A. Well, I didn't know he had a new injury that day until the boss came back and was telling us about it.

Q. I understand you made a note of the torch, where the torch was, notwithstanding you had no knowledge of his injury. Is that correct?

A. Well, I remember where it was.

Q. All right. You said that. Did you ever go back that day—how long did you work that day, Mr. Galloway?

A. Until three-thirty, quitting time.

Q. Did you ever go back that day between eleven o'clock, [fol. 239] the time he was injured, and three-thirty that afternoon, quitting time, to this culvert, to look to see what its condition was?

A. No, sir.

Q. Can you tell me whether or not it was covered with sloping-down rocks and gravel and so forth on that day, the culvert, or that it was not covered, either one?

A. I suppose it was. It was on the slope there.

Q. Did you go down and look at it?

A. No, sir.

Q. You did not. Did you go further south and look to

see if there was a path running along there, a worn path, a path that had been used so much it was worn, just south of that culvert?

A. No, sir.

Q. Is there such a path there?

A. Not to my knowledge.

Q. How many times have you been there since? When were you there last?

A. I don't remember any particular time working right at the culvert. We passed by several times.

Q. Did you take a look at it with special note to see whether there was or was not a path there?

A. No, sir.

Q. Never have?

A. No, sir.

[fol. 240]. Q. So you really don't know whether there is a path there or not, do you?

A. No, sir, I don't.

Q. There may be?

A. Are you talking about a path down the side of the track from the culvert?

Q. I am talking about a path that runs north and south, immediately west of the west set of tracks, which is the southbound main at the particular culvert—you say this torch was three hundred feet north of that culvert, so you have got that culvert in mind.

A. There is no path there. There is a wide shoulder, but no path.

Q. No path worn?

A. No, sir.

Q. Never has been?

A. Not since I have been there.

Q. You mean down to date?

A. Yes, sir.

Q. When was the last time you were by there?

A. One day last week. I don't remember the exact—

Q. Did somebody, one day last week, ask you to go by and look at it?

A. No, sir. We just went by going over the track.

Q. Has anybody ever asked you to go by and look at it?

A. No, sir.

Q. Has the claim agent asked you to do that?

[fol. 241] A. No.

Q. You did go by and look at it one day last week?

A. Just riding by on the motor car, watching the right-of-way.

Mr. Eagleton: All right. That's all.

Redirect examination.

By Mr. Sommers:

Q. Mr. Galloway, you worked only on Section 20. Is that right?

A. Well, that is my main stand. Sometimes we switch work with other sections, unloading heavy equipment and such as that.

Q. How long is that section?

A. Seven and a half miles.

Q. When you work on a particular section does that mean that from day to day you will go out within this seven and a half miles and perform work?

A. Yes.

Q. Where does that section extend from? Where is the beginning of it?

A. Mile post 303, which is north of Garner.

Q. North of Garner. Where do you fellows start out from in the morning?

A. At the tool house.

Q. Where is the tool house—I mean the town?

[fol. 242] A. At McRae, Arkansas.

Q. Which way do you go out of McRae to get to Section 20?

A. We are on Section 20 to start with.

Q. Which way does Section 20 run out of McRae?

A. North and south.

Q. Is McRae on the south end or the north end or in the middle, or where?

A. Pretty close to the middle.

Q. It is pretty close to the middle. Now, Garner Crossing is which way from McRae?

A. North.



Q. So every time that you want to go north out of McRae you will go past Garner Crossing. Is that right?

A. If you want to go that far whenever you do.

Q. Any where on this seven and a half miles, Mr. Galloway, is there any path that is maintained for section men to walk on?

A. No, sir.

Q. Are section men any place there required to shovel off themselves a path?

A. No, sir.

Q. Never has been there as long as you have been on the railroad?

A. No, sir.

Mr. Sommers: That's all.

Mr. Eagleton: That's all. I want you to remain in Court. [fol. 243] He is not to be excused.

Arnold McAllister, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sommers:

Q. Mr. McAllister, will you speak out good and loud so the jurors can hear you. State your name.

A. Arnold McAllister.

Mr. Eagleton: Arnold is the first name?

The Witness: Yes.

Q. (By Mr. Sommers:) Where do you live?

The Court: Lawrence?

The Witness: Arnold.

Q. (By Mr. Sommers:) Where do you live, Mr. McAllister?

A. McRae, Arkansas.

Q. Are you married?

A. Yes, sir.

Q. What is your job? What do you do for a living?

A. Now I am assistant foreman on extra gang Number 4, Arkansas Division.

Q. For the Missouri Pacific Railroad?

A. Yes, sir.

Q. How long have you been working for the railroad?

A. Four years, approximately.

Q. When were you made assistant foreman?

[fols. 244-245] A. Well, the first time I went out as assistant foreman was August 25th, '51.

Q. August 25th. You have been assistant foreman ever since?

A. No. I went back to Section 20, labor, May 8th, '53 or '52—'53 is right.

Q. You went back to Section 20 on May 8th?

A. Yes.

Q. Since that time you have been made assistant foreman on the section gang?

A. No. I have been made assistant foreman the 16th of November in '53.

Q. The 16th of November. That is on extra gang Number 4. Is that right?

A. That's right.

Q. Were you on the section gang or part of the section gang that Mr. Rogers worked with while he was there?

A. I was.

Q. How long have you known Mr. Rogers?

A. Well, all his life.

Q. All of his life. Now, were you there all the time that he worked on the railroad?

A. I was.

Q. On that section gang?

A. Yes, sir.

[fol. 246] Q. Now, on the last day that he worked down there, what did he do on the last day down there?

A. He was given a hand torch to burn the shoulder where the spray machine had poisoned the vegetation and killed it, to burn the vegetation.

Q. Who gave him the hand torch?

A. Our foreman, Mr. Howdeshell.

Q. Did you hear Mr. Howdeshell say anything to him?

A. He told him if he was able to work he could take that torch, it would be light work to work with.

Q. Did Rogers say he was able to work?

A. He said he thought he was.

Q. Thought he was able to fire the right-of-way?

A. Yes.

Q. What did the rest of you do?

A. We put in ties under the track.

Q. Where were you from where Mr. Rogers was?

A. We were north of him.

[fol. 247] Q. What else happened that morning so far as Mr. Rogers was concerned?

A. Well, as far as I know the next thing I knew about Mr. Rogers he came up past us and told the foreman his back was hurting him.

Q. Then what happened?

A. He asked him if he wanted to go to a doctor or go home. He said there had to be something done. So the foreman said he thought it best to go to a doctor.

Q. Did he say anything about falling on the railroad or on the right-of-way?

A. Not in my presence.

Q. What happened after that, Mr. McAllister?

A. Well, the boss told us to load the motor car. We started to do that, and he decided differently; thought it would be better and easier on the men to take him in the station wagon of one of the boys that was loading ties down at Garner. He sent one of the men to the station and came back and put him in the station wagon and carried him to the doctor.

Q. Did you help him over to the station wagon?

A. I did.

Q. Did you notice whether he had any singed eyebrows or singed hair?

A. I did not.

Q. You didn't see any?

A. I didn't see any.

[fol. 248] Q. Did he say anything about fire in his face?

A. Not in my presence.

Q. Mr. McAllister, is there any path on the right-of-way that men shovel up, keep clear for themselves to walk on?

A. Definitely not.

Q. Any place that you have worked on the right-of-way down there?

A. No, sir.

Q. You have worked on more than one section?

A. I have.

Q. Did you ever see one any place in Arkansas?

A. I haven't.

Q. Did you ever see any paths across culverts?

A. I have not.

Q. Do you know this culvert where this man claims he fell?

A. I do.

Q. Is it any different than any other culvert on the railroad?

A. No difference that I know of.

Q. How far have you worked on the railroad down there?

A. I worked from G. G. Junction, north of Bald Knob, to the yard limits in North Little Rock.

Q. How far is that?

A. Approximately fifty miles.

Q. Is there any place in that area where there are paths?

A. No.

[fol. 249] Q. For men to walk on?

A. No.

Q. Where do they walk when they want to walk?

A. Well, some walk on the shoulders and some walk between the rails and some between the track. Some will walk ahead of the ties on the outward end of the track.

Mr. Sommers: That's all.

Cross-examination.

By Mr. Eagleton:

Q. Did you ever go back to this culvert to look and see what its condition was shortly after the plaintiff, Mr. Rogers, was taken to the doctor that day?

A. I did not.

Q. Did you look at it any day since?

A. Well, I seen it several times since.

Q. Recently, too.

A. No, not recently.

Q. Did you look at it any day, the next day or the next day or two after this accident of July 17, 1951?

A. Sure, I looked at it, as we was patrolling the track.

Q. Did you ever see any path, worn path, that leads immediately south of the culvert and back south towards the Garner Crossing?

A. No, sir.

Q. You say there is none there?

A. Not to my knowledge.

Q. That includes up to date?

[fol. 250] A. Up to date.

Q. As a matter of fact, right now isn't that culvert—

Mr. Sommers: Wait a minute. This is three years since this fellow got injured. I don't know what the situation is down there now. I don't think there is any ground for going into that kind of testimony.

The Court: Wait a minute.

Mr. Eagleton: He said it is in the same condition now as then. I am asking him what its present condition is.

The Court: Overruled.

By Mr. Eagleton:

Q. As a matter of fact, Mr. McAllister, that culvert right at that place has been shoveled off and the concrete exposed, isn't it, so a man can walk on it?

A. No.

Q. Isn't it?

A. No.

Q. Isn't that the shape it is in now?

A. No, not to my knowledge.

Q. Is there a path that leads back from the culvert, a worn path, back to the Garner Crossing on the west side?

A. No, sir.

Mr. Eagleton: All right.

Mr. Sommers: That's all.

[fols. 251-258] The Court: What is the nearest house to the place where this accident happened?

The Witness: Well, I would say it would be Doctor J. R. Salome, across the highway.

The Court: Are there many people living in that neighborhood?

The Witness: Not too many.



Mr. Sommers: That is out in farm country, isn't it?

The Witness: Yes; beyond the edge of town, yes, sir.

Mr. Sommers: No settlement right near there?

The Witness: No.

Mr. Sommers: Where people would walk frequently across there or anything like that?

The Witness: Not too frequently, no.

Mr. Sommers: That's all.

(At this point a recess was taken from 12:20 P.M. until 2:00 o'clock P.M.)

At 2:00 o'clock P.M. on said 14th day of April, 1954, the trial was resumed.

[fol. 259] E. L. Cook, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sommers:

Q. Tell the Court and jury your name, please.

A. E. L. Cook.

Q. What does the E. L. stand for?

A. Elmer Louis.

Q. Where do you live, Mr. Cook?

A. One-half mile south of McRae, Arkansas.

Q. How old a man are you?

A. Thirty-seven years old.

Q. Are you married?

A. Yes, sir.

Q. Where are you employed?

A. Section 20, Missouri Pacific, on the Arkansas Division.

Q. How long have you worked for the railroad?

A. This last time about three and a half years.

Q. You worked for them before, I take it from your statement?

A. Yes.

Q. Section 20 is the same section Mr. Rogers worked on?

A. That's right.

Q. How long have you known Mr. Rogers?

A. Well, along since about 1937 or 1938. They had a little county baseball league there and he played for Vinity [fols. 260-261] and I followed the McRae team a lot.

Q. You say that was 1937 or '38?

A. '47 and '48. I was discharged out of the Army in '46. It was after that.

Q. Were you on the same section with him all the time that he worked on the railroad?

A. Yes, sir.

Q. I think his testimony is from about May 21st through July 17th?

A. I don't know the date, but all the time he was there I was there.

[fol. 262] Q. What was the first thing you knew anything was wrong with him on the morning, on the last day that he worked there?

A. After Mr. Howdeshell had taken him to Beebe, he come back and reported to us that he told him at Beebe that he had got hurt, slipped on the ballast and hurt his back over again.

Q. Mr. Howdeshell told you that after he came back?  
[fol. 263] A. Yes, sir; along about noon; I think it was the noon hour.

Q. You are getting a little bit ahead of me. How about before that? Did you know they were going to take him some place?

A. Yes, sir.

Q. How did you know that?

A. Because Mr. Howdeshell called us to load the motor car.

Q. Called you to load the motor car?

A. Yes.

Q. Did you load it?

A. No, sir. We started to and someone mentioned the station wagon about eight or ten poles from where we were.

Q. The testimony has been they brought the motor car on up and they took him out on the motor car—I mean on the station wagon?

A. Yes.

Q. Mr. Howdeshell went with him. Is that right?

A. Yes.

Q. What happened when Mr. Howdeshell came back, you say?

A. He told us that Rogers told him at Beebe that he had slipped and hurt his self again.

Q. Did you ever hear Rogers say that?

A. No, sir.

Q. I mean on that day or since then?

[fol. 264] A. No, sir.

Q. Was he up there near you where you could hear him talking before he was taken out in the station wagon?

A. No, sir. I was about three or four poles from the motor car, working.

Q. Three or four poles from the motor car?

A. Yes.

Q. When you were working?

A. Yes.

Q. What about when you were loading the motor car?

A. We never did load it.

Q. Were you up there to it when you started to load it?

A. I wouldn't say for sure, but I think we was either walking up there when they thought of the station wagon

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Q. You weren't near Rogers that morning just before he left?

A. Not close to him, no, sir.

Q. Now, Mr. Cook, have you heard the testimony with regard to this path supposed to be kept shoveled off there?

A. Yes.

Q. Is there any such path on the right-of-way?

A. No, sir.

Q. Is there any path you can shovel up where you could walk on?

A. No, sir.

Q. Where do you walk?

A. We either walk on the shoulder, sometimes on the [fol. 265] track, sometimes on the ties, or in the middle of the track. It all depends on the clearance and whether a train is coming. Sometimes down in the ditches.

Q. How about the culvert down there? Is there any culvert with a pathway that is kept across it?

A. No, sir.

Q. This culvert or any other culvert?

A. No, sir.

Q. Have you burned weeds down there?

A. Yes, sir.

Q. How did you do it?

A. With a hand torch.

Q. Is that the way it has always been done?

A. I have seen a little bit burned off by just throwing a match down in it.

Q. When did you start to work there?

A. September 11th, 1950.

Q. Have you ever seen this fire machine used since September 11th?

A. Not, since I have been working there, no, sir.

Q. Tell us, Mr. Cook, what about when you stack ties: Is it the custom to burn the grass where you stack ties?

A. No, sir.

Q. How is that done?

A. We stack the ties, throw the ties out of the car and [fols. 266-282] get out there and stack them; take our shovel and drag, what we call drag—we take the shovel flat on the ground and cut the weeds and grass back about three feet all the way around.

Q. There is no burning with this torch at that time?

A. No, sir.

[fol. 283] LEO. HOWDESHELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sommers:

Q. Now, Mr. Howdeshell, if you will speak up real loud so all the jurors can hear you I would appreciate it. Will you state your name?

A. My name is Leo Howdeshell.

Q. How old a man are you?

A. Fifty-five years old.

Q. Are you married?

A. Yes, sir.

Q. Where do you live?

A. I live in Beebe, Arkansas, four miles south of my

headquarters, which is McRae, Arkansas where I work out of.

Q. Where do you work?

A. McRae, Arkansas; Missouri Pacific Railroad Company.

Q. What is your job with the railroad?

A. Section foreman.

Q. How long have you worked for the railroad?

A. The 28th day of this month it will be thirty years.

[fols. 284-286] Q. How long have you been a section foreman?

A. Twenty-five years.

Q. Do you know Mr. Rogers who is in the plaintiff in this lawsuit?

A. From the time I employed him—

Q. Do you know him?

A. I didn't know him before hand.

Q. You know him now?

A. Yes.

Q. Did you know him before you employed him?

A. No, sir.

Q. You say you employed him. Did you hire him on the railroad?

A. Yes, sir.

[fol. 287] Q. Now, on the morning of the 17th did you put him to work firing?

A. On the morning of the 17th he came out and I asked him how he was feeling. He said, "I feel pretty good this morning." We got on the motor car and went north from McRae to Garner, which is about three miles. I was putting in ties, going to put in ties a quarter of a mile north of this crossing at Garner. I asked him if he felt like he could take this torch and burn the shoulder off the right-of-way where the weed burner or sprayer had killed the weeds just along the shoulder.

[fol. 288] Q. What did he say to you then?

A. He said, "Yes, I can do that."

Q. Did you stop there at Garner Crossing?

A. I stopped there at Garner Crossing. I believe we got drinking water nearby and he taken the torch and started to burn the shoulder.

Q. Where did the rest of you go?



A. We went a quarter of a mile, approximately a quarter of a mile north of the crossing and turned the motor car off. The rest of the men went to putting in ties.

Q. That was about what time of the morning that you got out there? Speak right up. I don't know—can you fellows hear him back there?

A Juror: Just about. Speak up a little bit louder.

A. I don't exactly know whether I did any other work before I went up to Garner or not, but it was around between eight and nine o'clock.

By Mr. Sommers:

Q. Sometime in the morning?

A. Yes; we got up to Garner.

Q. Now, after you let him off and after the rest of you went on up there a quarter of a mile and started putting in ties, when was the next—did you see Mr. Rogers down there burning?

A. Occasionally I would look down that way and he [fol. 289] was burning along.

Q. Burning along with the torch?

A. On the shoulder with his torch.

Q. When was the next Mr. Rogers contacted you? Did he contact you after that?

A. He came to me about ten or ten-thirty, I believe it was when he came up to me and said he slipped and fell there,—no. He come to me and he said he was hurt. That is the way he first put it to me.

Q. When he first came up to you he said what?

A. His back was hurting him, hurting him bad.

Q. Then what happened? What took place then?

A. I said, "Do you want to go home or go to a doctor, or what do you want to do?"

Q. Did you order him to go to a doctor?

A. He said, "I have got to do something." I said, "Do you want to go to a doctor?" He said, "Yes." I said, "Let's go."

Q. You were going to take him to a doctor?

A. Yes.

Q. Up to that point had he said anything to you about falling?

A. No, sir.

Q. Go ahead. What did you do when he said he wanted to go to a doctor?

A. I first hollered to the gang to load the motor car.

[fol. 290] Q. Just a minute, now. Get your hand down, Mr. Howdeshell. Speak up a little louder. Your voice doesn't carry very well with this big high ceiling in this courtroom.

A. When we decided to take him to the doctor, I first ordered the men to load the motor car up. I had a friend down there that had a station wagon in the tie yard, which was about a quarter of a mile north of the crossing and I sent a man after this station wagon, because it would be quicker and easier to take the man to the doctor.

Q. Did the station wagon come?

A. Come immediately.

Q. By the way: When Mr. Rogers came up to you there did you give him a drink of water or anything?

A. No, sir.

Q. Did he ask you for one?

A. Not that I recall.

Q. Then after the station wagon came up there what did you do with him then?

A. I and one of the boys helped him to the station wagon and I carried him to the doctor.

Q. Carried him to the doctor. You say you "carried" him to the doctor. That is Southern talk for saying you rode with him to the doctor?

A. We went along. I went along with him.

[fol. 291] Q. Now, was he able to talk?

A. Yes, sir.

Q. Did he talk to you on the way to the doctor?

A. Yes.

Q. Did you go to the doctor with him?

A. I went to the doctor with him. I told the doctor this boy's back was hurting again. The best I remember, he just started to pull his shirt off to examine him. And Roadmaster J. F. Smith, which is my boss, just rolled up over on the railroad, just a block from this doctor's office and I went out there to report the incident to him.

Q. You were talking to Mr Smith for awhile. Is that right?

A. I talked to him a few minutes.

Q. Then what did you do?

A. I went back to the doctor's office, just as Mr. Rogers was coming out of the door.

Q. He was coming out of the door. And then where was Mr. Clohr while this was going on?

A. Mr. Clohr, the man that hapled us to the doctor, was waiting for us at the curb nearby in the car.

Q. When you went back to the doctor's office when Mr. Rogers met you coming out of there did you say anything to him then?

A. I asked him if he was ready to go. He said yes.

Q. What did you do then?

[fol. 292] A. We got in the station wagon and this fellow Clohr—he is a tie man—he asked me if I had time for him to run to the station, to the depot over there, which is about a block and a half away, to bill out a car.

Q. Did you go over to the depot?

A. We went over to the depot. He gets out and goes in the depot and I and Mr. Rogers remained in the station wagon.

Q. While you and Mr. Rogers were sitting in the station wagon did you have a conversation with him?

A. Yes.

Q. What did he say to you?

A. He told me, while we were sitting in the station wagon, he said, "Mr. Howdeshell, I slipped and fell on the ballast this morning and hurt my back."

Q. Had he at any time previous to that said anything about slipping on the railroad?

A. No, not at all.

Q. After he told you that did Mr. Clohr come back out after awhile?

A. In a few minutes.

Q. Then what did you do then?

A. I taken Mr. Rogers home.

Q. You say you taken Mr. Rogers. Mr. Clohr was driving the car?

A. He was doing the driving.

[fol. 293] A. I went along with him, taking him home.

Q. Did you leave Mr. Rogers there at home?

A. Yes.

Q. Where did you go?

A. I went back to my job.

Q. You went back to your job. Did you tell the men there that he said he had fallen?

A. When I got back to the men, of course, they was asking me what happened. I said Mr. Rogers said he fell, slipped and fell on the ballast and hurt himself.

Q. Did he ever at that time say anything about a culvert being involved?

A. Not to me, no, sir.

Q. When did you first hear about a culvert being involved?

A. The Sunday after the 17th; I believe it was on the 20th, if I am not mistaken, when this attorney came down and taken statements from some of us boys.

Q. You mean the attorney told you?

A. He come up there and wanted a statement from me in regard to Mr. Rogers slipping and falling on a culvert. This was the 17th—I believe Sunday was the 20th. Anyhow, the Sunday following the 17th.

Q. When you went back on the section, Mr. Howdeshell, after you had taken Mr. Rogers home there what did you do then?

A. After taking Mr. Rogers home I went back to my [fol. 294] gang, got in my motor car and taken the gang to McRae on the motor car. I got in my automobile and goes back to Beebe and files a wire message to my supervisory officers, which consist of the Superintendent, the Division Engineer and the Roadmaster.

Q. The wire message was in regard to this—

A. This second injury.

Q. What was done with the man's torch, or where was the man's torch?

A. Well, when I got back after taking him to the doctor, I believe one of the boys picked it up and laid it on the shoulder.

Mr. Eagleton: Is this something somebody told you?

The Witness: I saw it.

Mr. Eagleton: All right. Go ahead.

The Witness: It was laying on the shoulder; not burning. All the grass and weeds had burned up to right where the torch was laying.

By Mr. Sommers:

Q. All right. Now, did you do anything about the spot where the torch was that day?

A. Nothing except I marked the rail with a piece of yellow crayola, chalk.

Q. You mean crayon?

A. Yes; crayon.

Q. Why did you do that?

A. After I went back and made the second report I [fol. 295] knew the claim agent would be out making another investigation and I would have a marker there where his torch was laying.

Q. Have you had other accidents on that section in your lifetime?

A. Yes.

Q. So you marked that point that day where you found the torch. Is that right?

A. Yes.

Q. Thereafter were you called upon to show the claim agent where that was?

A. Yes, sir. The claim agent came out, I believe it was on the 25th following the 17th and taken statements, and we measured it, he and I.

Q. Where did you measure it from?

A. From the center of the culvert.

Q. From the center of the culvert. That was the 25th; that was three days after you talked to the lawyer. Is that right?

A. Yes; after the lawyer said that he slipped and fell on the culvert.

Q. What measurements did you make there?

A. Taken a fifty-foot tapeline and measured up to the side of the rail, to the culvert where I had this mark on the rail.

Q. Could you still see at that time where the fire had burned?



[fol. 296] A. Yes. It was still visible where the fire had burned and the grass and weeds were still standing there and the weeds on ahead, where it hadn't been burned, there was a difference there where it had been burned and where it had not been burned at that point.

Q. What claim agent was that?

A. Mr. Hubbell.

Q. It wasn't Mr. Eckler here?

A. No, sir.

Q. Now, what measurement did you find? What was the distance between the culvert and—

A. (Interrupting) From the center of the culvert to where the torch was laying and the right-of-way had been burned, three hundred and sixty feet.

Q. Three hundred and sixty feet?

A. By tapeline.

Q. Is that direction north from the culvert?

A. North of the culvert.

Q. All right. Why, Mr. Howdeshell, on the 17th, did you have Mr. Rogers burning grass instead of helping with the ties?

A. I didn't feel he was physically able from his first injury to put him on ties.

Mr. Eagleton: I object to that because it is a conclusion.

Mr. Sommers: Well, it is the reason why.

The Witness: It was my responsibility.

[fol. 297] Mr. Eagleton: Wait just a minute. Let the Court rule.

The Court: His testimony awhile ago, I think, is sufficient basis for that question, as I recall.

Mr. Eagleton: I don't think his thinking about whether plaintiff was physically able or not—one layman can't pass on another.

Mr. Sommers: Of course, the question doesn't ask him for what his physical condition was; merely asked him why—

Mr. Eagleton: Go ahead.

Mr. Sommers: —he didn't have him pulling ties.

Mr. Eagleton: I withdraw the objection. Go ahead.

Mr. Sommers: Do you understand the question? Go ahead and answer.

The Witness: Ask it over. The question was why I didn't have him putting in ties?

By Mr. Sommers:

Q. Why did you have him burning grass instead of helping the rest of them?

A. I didn't think the boy was able to go out and pull ties. I didn't want to take a chance with the boy hurting his back until it was well.

Q. Was he doing any work previous to that time?

A. No, sir.

[fol. 298] Q. Any heavy work at all?

A. No, not at all; not a thing in the world from that time until this day.

Q. Did you hear him say that he had helped Healy put in ties?

A. Yes, sir.

Q. Did he do that?

A. No, sir.

Q. Do you remember that train coming by down there?

A. Yes, sir.

Q. What time of the day did that train come by?

A. It was a freight train. It is liable to go by—they don't run on schedule. They are liable to be a few minutes late. The best I remember it was between eight and nine o'clock—it was later than that. It was between nine and ten o'clock. They don't run on schedule, these freight trains, don't. The passengers do.

Q. Now, Mr. Howdeshell, after that freight train went by, about how long was it after that that Mr. Rogers came up and told you his back was hurting, if you can remember?

A. I didn't time it, but the boys had all gone back to work and been working a few minutes. I would say about twenty minutes before he came to me.

Q. The boys were already—

A. (Interrupting) The boys were already back to work.

Q. They had gotten off when the train went by?

[fol. 299] A. Yes. They cleared the track when the train come along.

Q. They were already back working on the ties?

A. Yes, sir.

Q. When Mr. Rogers came up to you did you see any singed hair or singed eyebrows on him?

A. I didn't.

Q. Did he say anything about fire getting on him?

A. Not fire getting on him. I believe he said smoke got in his face or something like that. I don't recall.

Q. When was it he said that to you?

A. No, he didn't. I withdraw that. He didn't say anything about no smoke or nothing in his eyes at that time.

Mr. Eagleton: You want that withdrawn?

A. His back was hurting him.

Q. When did he say that?

A. Talking to me in the station wagon down there.

Q. When he told you that the accident happened?

A. When he slipped and fell.

Q. Now, Mr. Howdeshell, are you familiar with that machine that they use to burn the right-of-way?

A. Yes, sir.

Q. How long has it been since that machine has been used?

A. It was late '49 or the early part—somewhere in '50; [fol. 300] I believe the early part of '50 the last time we operated that.

Q. Do they use it any more?

A. No, sir.

Q. Why did they quit using it? Let me ask you that, if you know.

A. It causes too much fire. It sets the right-of-way afire and drifted out in the adjoining property and burned up hay pastures and woodland.

Q. When the thing set fire what did the section crews have to do?

A. The section crew would have to follow along and put this fire out. It set the ties afire and set the right-of-way afire. It would spread, if you wasn't right there. If there was a wind it would spread on the engine.

Q. It was the section hands' duty to go and fight that fire?

A. We fought it.

Q. Now, since the latter part of 1949 or 1950 what was done with this machine?

A. It has been converted into a sprayer to poison the weeds and kill them.

Q. After that what is done to the weeds?

A. After it kills them they die down and we burn them off.

Q. How do you burn them off?

A. Well, use a torch, anything—I have used fire—most [fol. 301] of them use an old hand torch or something that is handy.

Q. Is that the way it has been done ever since that time?

A. Sure has.

Q. Do you have more or less fire since you have adopted that method?

A. We have a lot less fire.

Q. A lot less fire?

A. Yes.

Q. Does that cut down on the amount of fire fighting?

A. It sure did.

Q. Mr. Howdeshell, you say you have been on the section for thirty years. Is that right?

A. The 28th day of this month, yes, sir.

Q. Did you hear Mr. Rogers testify about a path they kept shoveled off for men to walk on?

A. Yes.

Q. Is there any such path on the railroad right-of-way that you know of?

A. I have never seen it.

Q. How about the culverts down there? Is there any path?

A. No pathway, no walkways on the culverts.

Q. This particular culvert, are you familiar with that?

A. Yes.

Q. How often do you go out by there?

A. Well, every time I go over my track I ride over [fol. 302] it. I patrol the track two or three times a week; sometimes every day.

Q. Do you work around there sometimes?

A. Sometimes we work around there, yes, sir.

Q. Is that culvert any different from any other culvert?

A. We have several culverts of the same make. The land is built up the width of the shoulder, of the dump, to hold the ballast, the same as the dump does, for the pur-

pose of holding your rock ballast in shape, just like the dump here does.

Q. Are there any of them you know of that have got a pathway that is kept shoveled up by the section crew?

A. No, sir.

Q. Any place on the railroad, you know about?

A. No, sir.

Mr. Sommers: I think that's all.

Cross-examination.

By Mr. Eagleton:

Q. Mr. Howdeshell, when a man is walking on the shoulder ballast, he is not walking on the ballast of the railroad? The ballast is under the ties and then it slopes down from the ties down to the shoulder; there is a level part there, isn't there?

A. Occasionally, Yes.

Q. Well, generally speaking?

[fol. 303] A. Generally speaking there is a shoulder there, just like on your highway.

Q. In other words, the shoulder, when we speak of that on a highway—sometimes you — signs, "Shoulder slippery when wet" or "Don't pull on shoulder," or something of that kind. You see those signs, don't you?

A. Yes.

Q. The shoulder is merely an extension of the regular highway. That is what you are talking about?

A. It is an extension of the dump.

Q. In this instance the shoulder is the level part that extends out from the dump. Is that correct?

A. That is correct.

Q. It extends out from the dump on which the ballast sits, about five or six feet, doesn't it?

A. No, sir; not all the way. I have got places on my track that don't stick out over eighteen inches.

Q. Well, say eighteen inches. You have got some other places where your shoulder is wider than that?

A. Yes.

Q. Three or four feet?

A. Yes, sir.



Q. At this particular place, both south and north of this particular culvert, the shoulder is, over and above the ballast, is about four feet wide, isn't it?

A. Approximately that; three or four feet wide.

[fol. 304] Q. Now, getting back to this machine that you used to use: Did you say—maybe I misunderstood you—did you say originally that one of the reasons you discontinued it was the cost of it?

A. No.

Mr. Sommers: He didn't say that.

A. I don't think I meant that.

By Mr. Eagleton:

Q. I misunderstood you. I asked Mr. Jones and he didn't hear it either. I thought you started by saying it cost too much.

A. No, I don't think so.

Q. How long had you used that machine in that way?

A. The original weed burner?

Q. Yes.

A. Since around about 1928 or '9.

Q. In other words, you used it for twenty years?

A. No, not quite.

Q. If you used it from 1928 or '29 until 1949—

A. Somewhere about that. I don't remember the exact year.

Q. You can regulate these sprays and shoot it any distance you want?

A. There is a limit to how far you can shoot it out.

Q. I didn't catch that.

A. There is a limit to how far.

Q. You can shoot them out to the maximum or you can shoot them out to less than maximum?

[fol. 305] A. As far as you can shoot them out at all would be approximately ten or twelve feet from the rail.

Q. Or anything less than that that you desire?

A. Yes; draw them in; work them in and out just like your fingers.

Q. A few minutes ago when Mr. Sommers was asking you questions about what the plaintiff said to you sitting

in the station wagon, about whether or not he had any heat on his face, you said you thought he said that smoke got in his face.

A. Well, that was said in the station wagon—is that your question?

Q. Yes.

A. He told me smoke got in his face and he slipped and fell. That was the first time, while he was in the station wagon, he ever mentioned it; about an hour after we had left the job.

Q. What did you mean awhile ago by saying you wanted to withdraw that statement? What did you mean by withdrawing it?

A. That was while we was up there at the motor car before we went to the doctor. He just told me he was hurt. That is what he told me.

Q. Oh, I get the point now. You are withdrawing the statement because he made it while sitting in the station wagon, at the doctor's office, rather than up at the motor car?

A. He didn't make no such statement at the motor car.

Q. He did make it in the station wagon?

[fol. 306] A. Yes; after we got to the depot an hour later.

Q. Did he say smoke and fire or just smoke? Do you remember that clearly?

A. Oh, I don't know. He said that train passed and smoke got in my eyes or something to that effect and I slipped and fell.

Q. Did he exclude the word "fire?"

A. I won't say.

Q. Your first impression, I think, was to load up or put him on the motor car?

A. Yes, sir.

Q. You would drive the motor car or some other man would drive it, or what?

A. I would have or one of the men.

Q. You would go with him?

A. Yes.

Q. That would make it three: The injured man, yourself and the driver. Is that right?

A. If you got the motor car out you are carrying plenty of help in case you meet a train to put it on or off.

Q. You have to put the car on?

A. You carry enough men to put the car on or off in case you meet a train.

Q. You first have to load it on or off, whatever the case may be?

A. Yes.

Mr. Eagleton: I believe that's all.

[fol. 307] Redirect examination.

By Mr. Sommers:

Q. This shoulder portion Mr. Eagleton inquired about, is that kept by the crew as a path or anything like that?

A. No, sir. We don't maintain no walk, no pathway up and down the track.

Q. Where do the men walk when you got to walk?

A. If we are going out to work we leave the tool house on the motor car.

Q. And you drive out to where you are going to work?

A. Drive the motor car to our destination or everywhere we are going to work; turn the motor car off and go to work and we just walk in—

Q. You don't understand me. That is when you go to work you take the motor car out to work, you drive to where you are going to work and work around in that area. Is that right?

A. Yes.

Q. Let's assume the occasion calls for a fellow to walk down the road a piece or something like that, either firing or some other purpose: Where are the places to walk?

A. You can walk on the rail or walk up on the ties. There is no particular place—

Q. On the gravel—

The Court: Let him answer.

Mr. Sommers: Pardon me.

[fol. 308] The Witness: There is no particular place for a man to walk. You just walk on the track or the shoulder. It is just a railroad; no walkways; no highways; it is just a railroad.

Q. It is just a railroad.

A. You walk on the track or you walk by the side of it or walk out in the right-of-way.

Q. Now, this shoulder: Is there any system whereby this gravel is shoveled out of there or anything like that?

A. No, sir.

Q. You said at this particular place the dump was four feet wide. Does that mean the shoulder?

A. The shoulder was probably three of four feet wide.

Q. Does the gravel get down off that—

A. Just about—

Q. I don't mean down off—what do you mean when you say it is four feet wide? Is that the dump that is four feet wide?

A. From your ballast edge down to what we call the shoulder of the dump.

Q. At other places it may not be that wide?

A. Lots of places it is not half that wide; narrower.

Q. As to this culvert: Is there ever any walkway kept across a culvert?

[fol. 309] A. Not in my thirty years of railroading.

Mr. Sommers: That's all.

Recross-examination.

By Mr. Eagleton:

Q. Just so we understand this. You are talking about a shoulder. That is the level portion of the roadbed there, and the ballast comes from the ties, in this instance from the west end of the ties over to the west edge of the ballast, and then the rest of the shoulder, four or five feet, is level at that place?

A. At that particular place possibly three to four feet.

Q. There is no ballast on that shoulder?

A. Not any more unless there would be loose rock kicked out.

Q. There is no point in letting the ballast reach out to the shoulder?

A. We don't maintain it that way.

Q. You try to maintain the shoulder free from ballast?

A. We keep it lined up.

Q. You can use any word you want to, either "maintained" or "lined up." What you try to do is keep your ballast—can I use this?

A. Come up here and use this (indicating).

Q. If the ballast ran out here in this discretion, it falls [fol. 310] down at an angle downward and your track is up here. This white represents the ballast (illustrating)?

A. Yes.

Q. Then it runs out to the shoulder which is west of the tracks four or five feet. Is that right?

A. Three to four feet.

Q. This thing we are talking about is the shoulder (illustrating)?

A. Yes, sir.

Q. If this place was three or four feet wide, you don't let the ballast run over it, do you?

A. With vibration it will roll down there. We don't pick it up. We don't maintain that in particular. If the rock rolls down, it rolls down there.

Q. What would you say to your men, as a section foreman, if you came along a place and the ballast had rolled all over this shoulder so the shoulder was no longer there and it was encroached upon by this ballast to a considerable amount—not just a loose rock or two—you would tell them to keep your edge in line, to edge it up?

Mr. Sommers: Let him answer. I object to that. He is asking a question and answering it.

Mr. Eagleton: This is cross-examination.

Mr. Sommers: You can't ask a question and answer it. Ask him the question and let him answer.

By Mr. Eagleton:

[fol. 311] Q. When you said awhile ago, you said you kept your edge lined up. By that you meant you kept the edge of this ballast lined up straight, didn't you, as straight as you can?

A. Approximately.

Q. I don't mean to say that you put a level on it.

A. Now, wait. It is almost—we don't put an edge on it, you see, or a board on it, but it is almost straight.



Q. Just like if you are up in an airplane, looking down

A. It wouldn't be quite that straight.

Q. Wait a minute. You haven't got what I want to say. If you go up in an airplane and you look down and see rows of plants on a farm, they look pretty straight; you can see all the rows right along.

A. We try to maintain our ballast on a straight line.

Q. On a straight line. That would be, in this instance, from the east end of the shoulder back to the railroad ties. Is that it?

A. Yes, sir.

Q. The shoulder is on the west side and the shoulder runs north and south, doesn't it?

A. Yes, sir.

Q. It is three or four feet wide? Is that right?

A. Three or four feet wide—

Q. That is the west edge.

The Court: Let him answer.

By Mr. Eagleton:

Q. Is that correct?

[fol. 312] A. Three or four foot wide at that particular place.

Q. And south of that culvert?

A. It is.

Q. Now, I am talking about that shoulder, if it runs north and south and it is three to four feet wide—that is about this distance here (indicating)—it has a west edge of the shoulder and an east edge of the shoulder, doesn't it?

A. The east edge of the shoulder is on the opposite side of the other track.

Q. No. That is the east shoulder; that is the shoulder on the other side. I am talking about this shoulder that is four feet wide. It has to be four feet wide from east to west, doesn't it?

A. From the ballast edge to the edge of your shoulder, yes, if that is what you are talking about.

Q. The ballast edge, in this instance, is on the east edge of that shoulder. Do I make myself clear?

A. The ballast is on the east side—the west side of the shoulder.

Q. I don't think that is true.

A. Oh, yes.

Q. The shoulder runs north and south?

A. Yes.

Q. And the ballast edge is on the east side of that shoulder, isn't it?

A. It is on the west side of the track, and your shoulder [fol. 313] extends out three or four foot beyond the ballast edge on the same side of the track.

Q. I think we have got the same thing in mind, but this is the record the stenographer makes and I want to make sure he has got it correct. The shoulder is three or four feet wide. The only shoulder I am talking about in this particular instance is the one that is west of the tracks, near this culvert.

A. That's right.

Q. But the ballast only comes down to the east edge of the shoulder. Is that right? That is correct, isn't it?

A. Why?

Q. That is what I thought you said. Is that correct?

A. The ballast comes down on the east side of your track, also, to the shoulder. Then your shoulder extends three or four feet.

Q. Beyond that?

A. In the same direction.

Q. To the west of it. Is that right?

A. Absolutely. That is what I was talking about.

Mr. Eagleton: That's all.

Further re-direct examination.

By Mr. Sommers:

Q. Do you ever go along, Mr. Howdeshell, and do any shoveling just to throw chat or gravel back up in there?

A. No, sir, except—

Q. I take it when you pull ties out there you try to [fol. 314] shovel or you do some shoveling?

A. When we do a day's work and disturb the rock we dress it back up like it was before we started.

Q. Do you ever call out the detail to go along and shovel off this shoulder so it will be clean to walk on?

A. No.

Mr. Sommers: I have got a picture here. You may object to it.

The Court: Let me ask you this—

Mr. Sommers: That is the east shoulder.

Mr. Eagleton: It is the east side?

Mr. Sommers: Let me ask him about this. Mark this as an exhibit.

(Photograph marked by the Reporter as Defendant's Exhibit O.)

The Court: I would like to ask the witness a question.

Mr. Sommers: Go ahead, Your Honor.

The Court:

Q. In your thinking, Mr. Witness, on the west side of the track, for example, does the shoulder come up to the end of the ties or up to the rail?

A. Your Honor, the shoulder is the foundation on which the ballast is placed; on which the ties is placed, and then the rail. The shoulder is the earth embankment on which [fol 315] the track is built on.

Q. In other words, there is ballast between the ties?

A. Yes, sir. You lay your ties and distribute the ballast on it. That is the way we maintain it, on rock ballast.

Q. The rock ballast is the support for the ties? And this ballast extends out between the ties and sometimes beyond the ties?

A. About twenty, about thirty inches on an average beyond the ties; eighteen to thirty inches.

Q. On the west side, for example, where does the shoulder begin? At the rail or the end of the ties?

A. At the edge of the ballast.

Q. At the end of the ties?

A. At the edge of the ballast.

Q. The edge of the ballast. The ballast sometimes comes out beyond the ties?

A. Yes.

The Court: All right.

By Mr. Sommers:

Q. I will hand you Mr. Howdeshell, a photograph here which has been marked Defendant's Exhibit O and that is a photograph, I believe, looking south on the east rail and ask you if that does represent the east rail?

Mr. Eagleton: If the Court please, I object to the picture because it is no effort to show the conditions that the witness said were present on the west side and could only cause confusion. That is over on the other side of the track, admittedly.

Mr. Sommers: I will admit that. Let me see if I can tie it in and maybe it will remove your objection. If it is improper I am not going to push it.

By Mr. Sommers:

Q. And that shows the other side there?

A. Yes, sir.

Q. Are both sides the same? Would that look like the other side or not?

A. It is practically the same condition on both sides of the railroad.

Q. The other side is over here; it isn't a good view. Isn't that right?

A. Yes, sir.

Q. You say the other side looks just like this here?

A. It is about the same condition on both sides of the rail right at this location.

Mr. Sommers: Under that condition, I will offer it.

Mr. Eagleton: I object to it as being a picture taken at the opposite side. It doesn't purport to show the condition on the west side.

Mr. Sommers: Well, he said it would be the same. That is the reason I am offering it. I am not going to push it any. It is the only one I have.

[fol. 317] The Court: Has there been any material change in the railroad track since the accident?

Mr. Sommers: If Your Honor please, this photograph was taken on July 23rd, 1951.

The Court: I see. All right. It is admitted.

Mr. Sommers: I would like to pass it to the jury.

By Mr. Sommers:

Q. In all fairness, I want the jury to understand that is the east side. The accident happened over here on the west side, which the witness said would be about the same.

The Court: Is that all with this witness?

Mr. Eagleton: We are waiting for the jury to look at the exhibits.

Mr. Sommers: Well, I think that is all.

Further Recross-Examination.

By Mr. Eagleton:

Q. Mr. Howdeshell, I want to make sure I have got this thing fairly straight. This is a crude thing here (exhibiting sketch to witness). The rails are up here, you understand?

A. Yes.

Q. This is your roadbed with the ties underneath the rail. Is that correct? The ties are underneath the rails, of course. Is that right?

A. Yes. Your ties are under the rails.

[fol. 318] Q. There is a sloping-down from there as indicated by this line and that is filled with ballast, coming out from under the ties?

A. That is your tie. This is your rail. This is your ballast and this is your shoulder (indicating).

Q. In other words, from here to here, S to S is the shoulder right in there? That is the shoulder right in there where I marked it?

A. From this out.

Q. From this out?

The Court: You mean the shoulder is beyond the ballast?  
The Witness: Yes.

By Mr. Eagleton:

Q. The shoulder is about three or four feet beyond the ballast and this represents—I will put a B on there. That is the ballast. I will let it go at that. This line going down here is the ballast, with the B on it?



A. Yes.

Q. This part extends out beyond the ballast?

A. Yes.

Q. Whenever you find your ballast is slipping away because of the angle on which it is placed and getting on here, when your men go by, if they are assigned to that particular job, they dress it up and get it back up there again, get your ballast up off the shoulder?

[fol. 319] A. I haven't had no occasion to do that.

Q. The reason you have not had any occasion to do it, then, is your ballast is put in quite firmly so it will stick, isn't it?

A. It is put in there and it don't vibrate down unless—well, the rock will roll down.

Q. If it does in any considerable quantity, someone will call your attention to it?

A. Well, if you have a slide or something like that.

Q. You clean it out?

A. Sure, we clean it up if we have a slide.

Mr. Sommers:

Q. Does it get flat-ened down like it is represented here? Is that the usual way the ballast looks out there?

A. That is just about the way the ballast is maintained.

Q. Well, it isn't a sharp incline or anything like he has drawn on this diagram?

A. It ain't as sharp as he has got there.

Q. In other words, you build up a dump, don't you, when you are making a railroad?

A. Yes.

Q. That is a mound of dirt that is higher than the rest of the ground surrounding it. Is that right?

[fol. 320] A. Yes.

Q. On top of that you throw the ballast, gravel. Is that right?

A. Yes.

Q. On top of that you lay the tracks. Is that right?

A. Lay your ties on top of your ballast and lay your rail on top of the ties.

Q. Do you fellows ever do anything further with it except when you are removing a tie?

A. No.

Q. So it will mash down and look like this all the time. Is that right?

A. Yes.

Q. Regardless of where one ends and the other begins, this is a representation of what a railroad right-of-way looks like?

A. Yes. That is a general view of the railroad.

Mr. Sommers: That's all.

Mr. Eagleton: Mark this as a Plaintiff's Exhibit.

(Document marked by the Reporter as Plaintiff's Exhibit 12.)

By Mr. Eagleton:

Q. You are talking, you say the incline may not be sharp—I am not trying to be an engineer—but this drop from your ties down—

A. (Interrupting) It don't drop that sharp.

Q. It drops about a thirty-degree angle, doesn't it? [fol. 321] A. Something like that.

Q. It drops down a distance of about two feet in about six. Is that right?

A. Yes; something like that, yes, sir.

By Mr. Sommers:

You mean it does go out six feet? Is that right?

Mr. Eagleton: Wait a minute.

The Witness: The ballast don't go six feet from the tie.

Mr. Sommers: Let me see this exhibit.

By Mr. Sommers:

Q. It doesn't look like that on the picture, does it?

A. It don't drop as fast as that does.

Q. It don't drop anything like that?

A. No.

Mr. Sommers: That's all.

By Mr. Eagleton:

Q. It drops that thirty degrees; that means two feet in a distance of six feet, down to the shoulder?

A. No, not no six feet to the shoulder.

Q. Six feet back? In other words, in a distance of six feet back you drop about two feet down to the shoulder, which is three or four feet wide. Is that right?

A. Your ballast?

Q. Yes.

A. No. Your ballast is about thirty inches from your [fol. 322] shoulder.

Q. In that thirty inches how far does it drop before it gets to the level part of the shoulder, the four-foot part of the shoulder?

A. The ballast line is approximately eighteen or nineteen inches below your rail.

Q. It drops down eighteen inches to the east edge of the shoulder?

A. Yes, to the edge of the shoulder, regardless of which side it is on.

Mr. Eagleton: That's all.

By Mr. Sommers:

Q. It goes out to the edge at places. Is that right?

A. Your ball-st runs from your rail out under your ties. The ties is within eighteen inches, that is standard, from your rail. Your ball-st runs down—I don't know exactly what angle.

Q. You never measured that?

A. Approximately thirty inches from your rail to your gravel or your ballast edge out there.

Q. You are not an engineer; you never measured that?

A. No.

Q. Have you ever measured that degree or anything like that?

A. It is approximately thirty inches.

Q. I am not talking about inches.

[fol. 323] A. I don't know the degree.

Q. You are not an engineer?

A. I am not an engineer.

Mr. Sommers: That's all.

By Mr. Eagleton:

Q. Aside from not being an engineer and not knowing angles, you do know the ballast only runs from the rail down to the shoulder, a distance of about thirty inches. Is that right?

A. Yes.

Q. And then the shoulder begins where the ballast ends and runs about four feet beyond. Is that correct?

A. At this particular point, three or four feet.

Mr. Eagleton: All right. That's all.

Mr. Sommers: That's all.

The Court: Just a minute. Let me have that picture. In this picture, Defendant's Exhibit O, on the left side you see a lot of rocks, apparently rocks, to the west of the ties. Doesn't this picture show what you call the "shoulder" is covered with rocks, ballast?

The Witness: Your Honor, that shoulder extends out beyond this (indicating). Here is your gravel edge, rock edge here. Your shoulder extends on out here.

The Court: All right. It is time for our afternoon [fol. 324] recess.

(At this point there was a brief recess after which the trial was resumed.)

ROBERT LEON SERATT, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Sommers:

Q. Will you tell the jury your name, please?

A. Robert Leon Seratt.

Q. How old are you?

A. Thirty-five.

Q. Where do you live?

A. McRae, Arkansas.

Q. Are you married?

A. Yes.

Q. Where do you work?

A. Searcy Glass & Paint Company, Searcy, Arkansas.

Q. Where did you work before you worked there?

A. White County Glass Company, Searcy, Arkansas.

Q. What kind of work did you do at the glass company?

A. I am a glaz-er.

Q. Did you at one time work for the Missouri Pacific Railroad?

A. I did.

Q. When was that?

A. I started May 21st or 23rd, 1951 and quit the 30th of March, 1952.

Q. The 30th of March, 1952. You say you started May 21st or the 23rd?

[fol. 325] A. I don't remember. It was on Monday, whichever was on Monday of that week.

Q. Was that the same day Mr. Rogers started work?

A. The same day.

Q. You started to work together? Is that right?

A. Yes.

Q. Did you work all the time that he worked there?

A. Yes, sir.

Q. Were you on the same section?

A. Yes, sir.

Q. Were you a part of the crew all the time he was there?

A. Yes, sir.

Q. Had you known Mr. Rogers prior to that time?

A. No, sir, I did not.

[fol. 326] Q. Do you know anything about an accident to him on July 17th?

A. No, sir, I do not.

Q. What were you doing that day?

A. Putting in ties.

Q. What was he doing?

A. He was burning the right-of-way.

Q. What was the first thing you knew or what happened there in regard to Mr. Rogers, if you recall?

[fol. 327] A. About all I can say happened, the best way, would be he walked up the track. I saw him going to a car. My partner and I were quite a ways from the rest of the gang working, but they was going to a car.



Q. You didn't have anything to do with loading the motor car or anything like that?

A. No. Mr. Howdeshell hollered out for us to load the motor car. Then he said, "Go ahead with your work." He changed his mind.

Q. Did Mr. Rogers ever tell you, either at that time or later on, that he had ~~fallen on the ballast~~ or fallen on the culvert out there?

A. No, he didn't.

Q. Where did you hear that he had slipped on the ballast from?

A. Mr. Howdeshell.

Q. What did you hear about the culvert being involved?

A. I believe it was on the following Sunday when a lawyer—I believe the man's name was Roth—and a fellow by the name of Morris came to my house for a statement.

Q. Wesley Morris, is that who it was?

A. Yes.

Q. Did they mention to you the culvert was involved?

A. Yes.

Q. Was the *the* first you knew about the——

[fol. 328]. A. (Interrupting.) I believe it was, yes.

Q. Did you know where Mr. Rogers' torch was after he left that day?

A. Yes, sir, I do. I picked it up.

Q. You picked it up?

A. Yes.

Q. Where in relation to the culvert was that torch?

A. Well, I would say between three and four poles from the culvert. That is the way we measure the ground there. That would be the only way I could say or how I would judge the distance.

Q. When was that measurement made? Do you recall?

A. Well, that day it was just more or less an estimate, you know. We just knew how many poles it was to the culvert. I said culvert—well, we will say from where Mr. Howdeshell told me he got hurt. When you are putting in ties you don't gain but very little ground. It would be mighty easy to remember where you were. This torch was, I will say, not over thirty or forty feet from where I was working.

Q. From where you were working?

A. Yes.

Q. How far north of that culvert were you working?

A. Well, I would have been in the same pole range, between three and four hundred feet.

Q. How long is a pole?

A. Around a hundred feet—that is the distance between them.

[fol. 329] Q. Between the poles?

A. Yes.

Q. It was about a hundred feet between the poles?

A. I would say that.

Q. When you speak of a pole-length, is that between two telephone poles?

A. That's right. That is the way the mileage is numbered on the railroad.

Q. Now, do you know about that culvert that is down there?

A. Yes, sir.

Q. Have you worked around down there?

A. Yes, sir.

Q. Will you tell us whether or not there is any path maintained across that culvert?

A. No, sir, there is no path.

Q. Is there any path maintained across any culvert?

A. Not that I ever saw.

Q. Do you know of any path that is maintained by the section men for them to walk over?

A. I do not.

Q. Or any place on the right-of-way you ever worked?

A. No, sir.

Q. Have you burned weeds around there, been assigned to burning weeds?

A. Yes.

Q. How did you do it?

A. With a little torch by hand or pulling the grass or [fol. 330] throwing down matches or whichever way you wish.

Q. Do you know of any effort that is made to keep the gravel off the shoulder, or anything like that?

A. No, sir, I do not.

Q. Is the shoulder maintained for the purpose of men walking on?

A. No.

Q. I presume you can walk on there if you want to?

A. You can walk on there.

Mr. Sommers: That's all.

Cross-examination.

• By Mr. Eagleton:

Q. That is where most men do walk in coming up and down the right-of-way; if you are walking, you walk on the shoulder?

A. I believe, I would say while I was there I walked between the tracks most of the time.

Q. If your work was up on the dump or you were working on the rails, you would walk in between the tracks?

A. Yes.

Q. It depends on the place you are working out there?

A. Yes.

Q. When taking your motor car off you put it down on the shoulder?

A. Yes.

Q. The shoulder is lower than the rails, isn't it?

A. Yes, sir.

[fol. 331] Q. It is lower than the ties?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

Mr. Sommers: That's all. Thank you.

The Court:

Q. I would like to ask you what you think is the shoulder.

A. Well, I would think that the shoulder would be where the ballast ends, from there to the edge of the dump.

Q. What is the dump?

A. That would be the whole roadbed under both rails, or one rail, whatever you would have.

The Court.: All right.

### Redirect examination.

By Mr. Sommers:

Q. Is this exhibit here, is that the way the right-of-way looks there (handing photograph to witness)?

A. Yes, it does.

Q. That is the way it looks all the time down there?

A. It did when I was there. I haven't been on the track to see it it will soon be three years.

Q. Are you connected with the Missouri Pacific in any way at this time?

A. I am not.

Mr. Sommers: That's all.

### Recross-examination.

By Mr. Eagleton:

Q. Mr. Seratt, the way this picture is taken, focused, this [fol. 332] is east side over here and you can hardly see the right-hand side of that shoulder at all, can you?

A. That's right.

Mr. Eagleton: That's all.

### Further redirect examination.

By Mr. Sommers:

Q. Did the right side look about like the left side there? Would it be about the same comparable situation, or what is the situation?

A. I would say along here, by knowing that like I do, that was a mud track through there, but we had dug out this dirt to the edge of these ties or this ballast—the edge of these ties, where that would drain. This over here is scattered out at random.

Q. It would be about the same on the other side?

A. No; I don't think it had it dug out on the other side.

Q. This has been dug here?

A. Yes, on the left. That there, it looks like there is more gravel than there is over here. That other, it was put up

by machine. There is no mud there yet, so it is still in better shape, but it wasn't ~~maintained~~.

The Court: Do you know whether this picture shows the location of the culvert or not?

A. I don't know whether I could—no, sir, I don't believe [fols. 333-415] this picture would show the culvert. I think the culvert would be further north. I think this is looking south. I don't believe the culvert would be shown here.

The Court: Is that stepladder on that picture, does that indicate anything?

A. It could be, that could be a drain there. I don't know. It wouldn't to me.

The Court: That's all.

Mr. Eagleton: That's all.

Mr. Sommers: At this time that is all the live witnesses I have got today.

The Court: All right.

Mr. Sommers: I have got a deposition.

Mr. Eagleton: If the Court please, Mr. Sommers indicated he is going to bring a doctor in in the morning and inasmuch as we have to go until tomorrow, if it is all right with Your Honor—it is pretty hot and sticky and I would just as soon as quit now as four o'clock.

(Thereupon the trial of the above entitled cause was laid over to the next day, April 15th, 1954.)

On April 15th, 1954 at 10:00 o'clock A. M. the trial of the above entitled cause was resumed.

The Court: You may proceed.

[fol. 416] Thereupon the trial was resumed in the courtroom in the presence and hearing of the jury and the following further proceedings were had:

Mr. Eagleton: Plaintiff wants to show the formal offering of the exhibits that were introduced in the plaintiff's case, that is, all of them. There were some introduced after we got into defendant's case. I think they were numbered 1 through 12.

Mr. Sommers: There is no sur-rebuttal on the part of



the defendant. I would like to ask leave and I do ask leave to reopen my case for the sole purpose of offering the exhibits which we have introduced in the case, Your Honor.

The Court: Very well. They may be introduced.

Mr. Sommers; I think I have offered them in evidence.

Mr. Eagleton: The plaintiff will rest.

Mr. Sommers: Defendant will rest.

The Court: All right. Gentlemen of the jury, the next step in the proceeding is the preparation of the instructions.

(At this point there was a recess.)

The following proceedings were had outside the hearing [fol. 417] of the jury in the Judge's Chambers:

#### RULING ON MOTION FOR DIRECTED VERDICT

The Court: Gentlemen, I have overruled, at the close of all the evidence, defendant's motion for a directed verdict.

#### MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE

Comes now Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, the defendant herein, and at the close of all the evidence in the case, moves the Court to direct a verdict in favor of the defendant for the following reasons:

1. Under the law, the pleadings, and the evidence there is no submissible jury issue in the case and, under the law and the pleadings, the evidence is not sufficient to make a jury issue or a jury question;

2. Under the law and the pleadings, the evidence on behalf of plaintiff does not give rise to a cause of action against this defendant;

3. The evidence does not raise a question of fact as to any negligent act or omission on the part of this defendant, his agents, his servants or his employees;

5. The evidence on behalf of plaintiff fails to establish any act of negligence on the part of this defendant, his agents, servants or employees which caused or contributed to cause plaintiff's injuries, if any;

[fol. 418] 6. The evidence on behalf of plaintiff affirma-

tively establishes that there was no act of negligence on behalf of defendant, his agents, servants or employees, particularly no act of negligence as pleaded in plaintiff's petition, which caused or contributed to cause plaintiff's injuries, if any;

7. The plaintiff has failed to sustain the burden of proof of the issues raised in his petition;

8. Under the law, the pleadings and the evidence, the defendant is entitled to a directed verdict in his favor.

9. The evidence does not preponderate in favor of the plaintiff.

10. The weight of the evidence is in favor of the defendant.

Respectfully submitted. .

(Filed April 15, 1954). .

The Court: I have before me instructions A and B which have been offered on behalf of the defendant. These instructions I am refusing.

I have before me Instructions 1 to 8, both inclusive, which I expect to give and read to the jury.

Instructions 1 and 6 are offered on behalf of the plaintiff. Numbers 2, 3, 4, 5 and 7 are offered by the defendant. Number 8 is given by the Court. You may make your [fol. 419] objections and exceptions now, Gentlemen.

#### EXCEPTIONS TO INSTRUCTIONS

Mr. Eagleton: Plaintiff excepts to the giving of the instructions that were offered by the defendant and given by the Court as indicated heretofore. They are Instructions numbers 2, 3, 4, 5 and 7.

Mr. Sommers: Defendant objects and excepts to the action of the Court in overruling defendant's motion for a directed verdict at the close of all the evidence.

Defendant further objects and excepts to the action of the Court in refusing to give Instructions A and B offered on behalf of the defendant.

Defendant further objects and excepts to the action of the Court in giving Instructions 1 and 6 on behalf of the plaintiff and to each and every other instruction given on behalf of the plaintiff.

Thereupon the trial was resumed in the presence and hearing of the jury.

## INSTRUCTIONS GIVEN

### Instruction No. 1

The Court instructs the jury that under the law applicable to this case, it was the positive, non-delegable and continuing duty of the defendant to exercise ordinary care to furnish the plaintiff a reasonably safe place in which to work.

[fol. 420] In this connection, the Court instructs the jury that if you find and believe from the evidence that on the 17th day of July, 1951, the plaintiff, while acting within the scope and course of his employment for the defendant, was engaged in burning weeds using a hand torch along the defendant's right-of-way, a short distance north of "Garner Crossing" near the City of Garner, State of Arkansas, and that while so doing, if you do so find, plaintiff was required to work at a place in close proximity to defendant's railroad tracks whereon defendant operated its trains, and if you further find that on the occasion in question, while one of defendant's trains was passing the place where plaintiff was working, as aforesaid, it did cause fire from said burning weeds and smoke therefrom to come dangerously close to plaintiff and that plaintiff, in the exercise of ordinary care for his own safety, if you do so find, was required to retreat and move quickly away from said danger to the culvert mentioned in evidence and to use said culvert as his place of work, which said place was covered with loose and sloping gravel, if you so find, and which said place did not provide adequate or sufficient footing for plaintiff to thus move or stand under said circumstances; and if you further find under all the facts aforesaid, if you find them to be the facts, that the method of doing said work and the place of work thus provided by the defendant was unsafe and dangerous and not reasonably safe and that the defendant in thus adopting said method and if you do so find, and in providing said place of work, if you do so find, did fail to exercise ordinary care and was guilty of negligence, and that as a direct and proximate result thereof, if you do so find,

the plaintiff was caused to fall and to be injured thereby, then your verdict must be in favor of the plaintiff and against the defendant herein.

### Instruction No. 2

The Court instructs the jury that under the law applicable to this case it was the duty of the plaintiff to exercise ordinary care for his own safety, at all times, while performing his duties as an employee of the defendant.

In this connection, the Court instructs the jury that if you find and believe from the evidence that on July 17, 1951 the plaintiff, James C. Rogers, while an employee of the defendant and while burning weeds on a portion of defendant's right-of-way near "Garner Crossing" near the City of Garner, Arkansas, did move about on said railroad right-of-way with his arm over his eyes, and did move backwards and sideways without looking in the direction in which he was walking, and if you further find that under the circumstances mentioned in the evidence the plaintiff, in exercising ordinary care for his own safety, could have and should have looked in the direction in which he was [fol. 422] walking, but failed to do so and, if you further find that the plaintiff in failing to do so did not exercise ordinary care for his own safety and was guilty of negligence and that such negligence, if any, was the sole proximate cause of his injuries, if any, and that such alleged injuries, if any, were not directly contributed to or caused by any negligence of the defendant in any of the particulars submitted to you in other instructions herein, then, in that event, the plaintiff is not entitled to recover against the defendant, and you will find your verdict in favor of the defendant.

### Instruction No. 3

The Court instructs the jury that the charge laid by the plaintiff against the defendant in this case is one of negligence. Negligence is not in law presumed and a recovery may not be had on a charge of negligence except where such charge is sustained by the preponderance, that is, the greater weight of the credible evidence. But it does not devolve upon the defendant in this case to disprove said charge, but rather the law casts the burden of the proof of

said charge upon the plaintiff, and said charge of negligence must be sustained by the preponderance, that is, the greater weight of the credible evidence. If, therefore, you find and believe the evidence touching the charge of negligence against the defendant as submitted in these instructions [fol. 423] does not preponderate in favor of the plaintiff, then the plaintiff is not entitled to recover against the defendant and your verdict must be for the defendant.

#### Instruction No. 4

The Court instructs the jury that the mere fact of itself that plaintiff was injured and has brought suit claiming defendant was negligent is no evidence whatever that the said defendant was in fact negligent. Negligence is not in law presumed, but must be established by proof as explained in other instructions. Neither are you permitted to base a verdict entirely and exclusively on mere surmise, guesswork and speculation; and if upon the whole evidence in the case, fairly considered, you are not able to make a finding that defendant was negligent without resorting to surmise, guesswork and speculation outside of and beyond the scope of the evidence; and the reasonable inference deductible therefrom, then it is your duty to, and you must, return a verdict for the defendant.

#### Instruction No. 5

The jury are instructed that you are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight you may take into consideration his or her manner on the stand, his or her interest, if any, in the result [fol. 424] of the trial, his or her relation to or feeling towards the parties to the suit, the probability or improbability of his or her statements, as well as all the other facts and circumstances given in evidence.

#### Instruction No. 6

The Court instructs the jury that if you find in favor of the plaintiff under the evidence and other instructions of the Court, then in assessing his damages you will award him such sum as you find and believe from the evidence



will fairly and reasonably compensate him for the injuries he sustained on the occasion in question, and in arriving at the amount of your verdict you may take into consideration such pain and suffering, if any, as you may find and believe from the evidence plaintiff has suffered by reason and on direct account of said injuries and such pain and suffering, if any, as you may find and believe from the evidence plaintiff is reasonably certain to suffer in the future by reason and on direct account of said injuries, and you may also take into consideration such loss of earnings, if any, not to exceed the sum of \$215 per month, as you may find and believe from the evidence plaintiff has suffered on direct account of said injuries and such loss of earnings, if any, not to exceed the sum of \$215 per month, as you may find and believe from the evidence plaintiff is [fol. 425] reasonably certain to suffer in the future by reason and on direct account of said injuries.

#### Instruction No. 7

The Court instructs the jury that in this case the plaintiff is seeking to recover for injuries alleged to have been sustained on July 17, 1951. In no event are you to award him any damages for any condition of injury or ill health, if any, which he may have had or may have sustained before said date of July 17, 1951.

#### Instruction No. 8

The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict, your foreman alone may sign it.

#### INSTRUCTIONS REFUSED

#### Instruction No. A

The Court instructs the jury that, under the law, pleadings and the evidence at the close of plaintiff's case, plain-

tiff is not entitled to recover and your verdict should be for the defendant.

[fol. 426] Instruction No. B

The Court instructs the jury that in this case the plaintiff is seeking to recover for injuries alleged to have been sustained on July 17, 1951. In no event are you to award him any damages for any condition of injury or ill health, if any, which he may have had or may have sustained before said date of July 17, 1951 or for any aggravation of such condition of injury or ill health, if any.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

VERDICT—April 15, 1954

"We, the jury in the above cause, find in favor of the plaintiff on the issues herein joined and assess his damages at the sum of \$40,000.00."

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

JUDGMENT—April 15, 1954

WHEREFORE, it is considered and adjudged by the Court that the Plaintiff have and recover of the Defendant the sum of Forty Thousand (\$40,000.00) Dollars, together with the costs of this proceeding and that execution issue therefor.

[fol. 427] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT AND TO ENTER JUDGMENT IN ACCORDANCE WITH DEFENDANT'S MOTION FOR A DIRECTED VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL—Filed April 26, 1954

Defendant, having moved for a directed verdict in his favor at the close of all of the evidence in the above case, now moves the Court to set aside the verdict and judgment rendered against him, and to enter judgment in his favor

in accordance with his said motion for a directed verdict because:

1. Defendant's motion for a directed verdict should have been sustained.

2. Under the law, the pleadings and the evidence there, was no submissible jury issue in the case and, under the law and the pleadings, the evidence was not sufficient to make a jury issue or a jury question.

3. Under the law and the pleadings, the evidence on behalf of plaintiff does not give rise to a cause of action against this defendant.

4. The evidence does not raise a question of fact as to any negligent act or omission on the part of this defendant, his agents, servants or employees.

5. The evidence of the plaintiff and all of the evidence in the case affirmatively establishes that there was no act or omission constituting negligence on the part of this [fol. 428] defendant, his agents, servants or his employees.

6. The evidence of plaintiff and all of the evidence in the case fails to establish any act or omission constituting negligence on the part of this defendant, his agents, servants or employees which caused or contributed to cause plaintiff's alleged injuries.

7. The evidence on behalf of plaintiff and all of the evidence in the case affirmatively establishes that there was no act nor omission constituting negligence on behalf of defendant, his agents, servants or employees, particularly no act nor omission constituting negligence as pleaded in plaintiff's petition, which caused or contributed to plaintiff's injuries.

8. The plaintiff failed to sustain the burden of proving the issues raised in his pleadings.

9. The specific acts of negligence pleaded in plaintiff's petition were not proved, but were rather disproved by plaintiff's own evidence and by all of the evidence in the case to have caused or contributed to plaintiff's injuries.

10. Under the law, the pleadings and the evidence defendant is entitled to have the verdict and judgment set aside and to have a directed verdict and judgment entered in his favor.

[fol. 429] In the alternative defendant moves the Court

to set aside the verdict and judgment against him and to grant him a new trial herein in the event his foregoing motion for judgment, in accordance with his motion for a directed verdict is not sustained because:

A. Defendant incorporates here by reference the reasons numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10 herein above stated in support of defendant's motion for judgment in accordance with his motion for a directed verdict.

B. The Court erred in denying defendant's motion for a directed verdict at the close of all of the evidence submitted on behalf of plaintiff.

C. The Court erred in denying the defendant's motion for a directed verdict at the close of all of the evidence.

D. The Court erred in admitting incompetent, immaterial and illegal evidence offered by the plaintiff and erred in overruling objections of defendant to such evidence.

E. The Court erred in excluding proper, competent and material evidence offered by the defendant.

F. The Court erred in giving Instructions 1 & 6 on behalf of plaintiff and erred in giving each and every other Instruction on behalf of plaintiff.

G. The Court erred in refusing to give Instruction A & B [fol. 430] on behalf of the defendant.

H. The verdict is for the wrong party.

I. The verdict is against the greater weight of the evidence.

J. The verdict was excessive.

K. The verdict was so excessive that it indicates it was the result of bias, prejudice and passion on the part of the jury.

L. The jury returned an improper verdict.

M. The Court rendered judgment improperly on the verdict as returned by the jury.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

DEFENDANT'S MOTION TO SET ASIDE THE VERDICT, ETC. ARGUED  
AND SUBMITTED.—May 21, 1954

Thereafter, on the 21st day of May, 1954, Defendant's Motion to set aside the verdict and judgment and to enter judgment in accordance with Defendant's Motion for a

Directed Verdict or in the alternative for a new trial, was argued and submitted.

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[fol. 431] IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
 DEFENDANT'S MOTION TO SET ASIDE VERDICT, ETC., OVER-  
 RULED—July 26, 1954

Thereafter, on the 26th day of July, 1954, Defendant's Motion to set aside the verdict and judgment and to enter a judgment in accordance with Defendant's Motion for a Directed Verdict or in the alternative for a new trial was by the Court Overruled.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

NOTICE OF APPEAL—Filed August 10, 1954

Notice hereby given that Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, Defendant above named, hereby appeals to the Supreme Court of Missouri from the judgment entered in this action on the 16th day of April, 1954, and from the Court's action on July 26, 1954, in overruling Defendant's After-Trial motion for judgment or for a new trial.

CLERK'S CERTIFICATE OF MAILING OF NOTICE OF APPEAL  
 (Omitted in Printing)

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[fol. 432] TIME TO FILE TRANSCRIPT EXTENDED (Omitted in Printing)

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[fol. 433] TRANSCRIPT APPROVED (Omitted in Printing)

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[fol. 434-436] Reporter's Certificate to foregoing transcript omitted in printing.



[fol. 437] IN SUPREME COURT OF MISSOURI

No. 44,595

JAMES C. ROGERS, Respondent,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Appellant

ORDER ASSIGNING CASE TO DIVISION ONE—June 6, 1955

Now at this day, it is ordered by the court that the above entitled cause be, and the same is hereby assigned to Division One.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION OF CASE—September 16, 1955

Come now the parties, by their respective attorneys, and after arguments submit the above entitled cause to the Court.

IN SUPREME COURT OF MISSOURI

JAMES C. ROGERS, Respondent,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of the City of St. Louis.

JUDGMENT—November 14, 1955

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis

rendered, be reversed, annulled and for naught held and [fol. 438] esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor. (Opinion filed.)

[fol. 439]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE,  
SEPTEMBER SESSION 1955

No. 44,595

JAMES C. ROGERS, Plaintiff-Respondent,

v.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD  
COMPANY, a Corporation, Defendant-Appellant

Appeal from the Circuit Court of the City of St. Louis

Honorable F. E. Williams, Judge

OPINION—November 14, 1955

Plaintiff, James C. Rogers, instituted this action under the Federal Employers' Liability Act (45 U. S. C. A., § 51 et seq.) for personal injury alleged to have been sustained by him July 17, 1951, when, during the course of his employment, he was burning weeds on defendant's right of way near Garner, Arkansas, and fell at one of defendant's drainage culverts. Plaintiff had verdict and judgment for \$40,000 damages, and defendant has appealed.

Plaintiff alleged that he, as defendant's employee, was engaged in burning weeds by the use of a hand torch at a point a short distance north of Garner Crossing; that in so doing he was required to work at a place in close proximity to defendant's tracks whereon trains were passing; and that a train caused the fire from the burning weeds to come so dangerously close to him that he was obliged to retreat

and move quickly from the place where he was working and to use as a place of work a part of defendant's right of way that was covered with loose and sloping gravel which [fol. 440] did not provide adequate and sufficient footing for plaintiff to thus move or work under the circumstances. Plaintiff further alleged "that the said method of doing said work and the place of work thus provided became and were unsafe and dangerous and defendant in thus adopting said method and furnishing said place of work, failed to exercise ordinary care and was guilty of negligence and by reason thereof, plaintiff was caused to fall and to be injured thereby all of which directly and proximately resulted, in whole or in part, from the negligence of the defendant as aforesaid."

Inasmuch as defendant-appellant's initial contention is that plaintiff failed to make out a case submissible to a jury and the trial court erred in overruling defendant's motion for a directed verdict, we will examine the evidence tending to support plaintiff's claim.

Plaintiff, twenty-four years old when injured, fell and was injured at a culvert approximately two hundred fifty yards north of Garner Crossing, a public crossing over defendant's line. At this point defendant's double-track line lies in a north-south direction. The tracks, consisting of rails and ties resting on gravel or crushed rock ballast, are supported by an earthen "dump."

Plaintiff had become the employee of defendant as a section laborer May 21, 1951; and in the morning of July 17, 1951, he with others of the section crew in charge of one Howdershell as foreman had started working near McRae, a short distance south of Garner Crossing. The section men worked until ten-thirty between McRae and Garner Crossing, at which time the foreman directed others of the crew to do some work three or four hundred yards north of the crossing. However, plaintiff was given the task of burning weeds and other vegetation on the shoulder, and on an area two and a half or three feet wide down over the crest of the incline of the dump. Plaintiff was told to begin just north of the crossing and burn the vegetation up to a point several hundred yards north of the crossing. The vegetation was dry. It had been withered and killed by chemicals.

Plaintiff was given a torch consisting of a quart container [fol. 441] with a spout on one side and a three-foot handle on the other. The spout was stuffed with waste for a wick, and the container was filled with kerosene and "white gasoline mix." Plaintiff had not theretofore seen anyone attempt to fire vegetation with that sort of device. He said that normally it is done with a flame thrower wherein the operators sit fifteen or twenty yards ahead of the flame. Flame throwers burn the whole right of way. Plaintiff had seen a flame thrower used. This was long before he was employed by defendant. Plaintiff does not know what the section crew's duty was when the flame thrower was used. (Defendant's foreman testified a machine had been used as a flame thrower in burning weeds from 1928 or 1929 to early 1950. The machine caused too much fire. It burned hay, pasture and woodland on properties adjoining the right of way. The section men had to follow along and fight fire. The machine was later converted into a sprayer to kill weeds and after they are killed, the section men burn them. They use a torch or "something that is handy." They now have less fire and fire fighting.)

Pursuant to instructions, plaintiff had fired the weeds, "just spots," along the west shoulder and west side of the incline up to a point thirty or thirty-five yards south of the drainage culvert when a train came from the south on the east (northbound) track.

In firing the weeds, plaintiff had been walking two and a half or three feet from the west ends of the ties supporting the rails of the west (southbound) track. There is a flat place, "a path," along there—a shoulder three to three and a half feet wide—between the edge of the sloping ballast and the crest of the dump.

Having heard the train whistle for the crossing and having seen that the train was on the east track, plaintiff quit firing the weeds, set the torch on a tie west of the west rail of the west track and ran northwardly to a point "right next" to the culvert. He knew the culvert was there. He had noticed it when he "was running north." But he paid no attention to it. He had forgotten it at the time. And, ignoring the fire, plaintiff directed his attention to the [fol. 442] passing train. Plaintiff knew there would be a

"wind come along behind" a passing train; but, there being a track between the fire and the train, he "didn't think the wind would affect it too much." Plaintiff explained how he was injured as follows, "At the time I thought I was far enough away, that I was plenty far enough to clear myself of the fire or any danger of the fire and it was time to start to watch these journals. So I set my torch down on the end of the tie, and was standing out on the flat surface, watching the train go by. After the train had gotten approximately half or two-thirds of the way back, I felt this heat on my face, on the side of my face. I turned to see what had happened, and it was fire right up in my face. I threw my left arm over my face and started turning to the west, to the north, backing away rapidly from the fire, and that is when I walked in on this culvert and slipped and fell."

Plaintiff further testified his foreman had instructed that when trains approached the section men were to "get clear of what we were doing and stand and watch the trains go by for hot boxes. \* \* \* He (the foreman) said at all times he wanted some of (the) men on one side of the track and some on the other." The foreman had also said, "'Don't stand even on the end of the ties or close to the other rail while there is a train on the opposite rail, because the interference, the sound of one train would deaden the sound of another one that possibly would come from the other way.'" The foreman had said to "'always stand on the shoulder'." Plaintiff testified there was no flat surface or walkway over the top of the culvert where he was injured. A flat pathway on the shoulder including the ends of culverts was "supposed to be" kept free of ballast, so "the men would have a safe place to walk." He said that "normally" there is a flat place two or two and one-half feet on which to walk across a culvert; on this one there was nothing but crushed rock—no flat surface. "It (the ballast) rolled out from under me." Vibrations of trains had shaken crushed rock down onto the culvert so as to make a sloping incline.

Plaintiff, on cross-examination, testified that, when the [fol. 443] foreman told him and others of the section crew to suspend their labors when a train approached and watch



for hot journal boxes, he did not understand that he, plaintiff, when burning weeds, was to completely ignore the fire. Plaintiff "never thought he (the foreman) meant anything like that." Plaintiff said he knew it was his primary duty to watch the fire.

Plaintiff, on cross-examination, further testified as follows, "Q. When you slipped, you say the gravel slipped out from underneath you? A. Yes. Q. This is that portion of the gravel that is right up next to the ties, isn't it? A. Yes, sir. Q. There is gravel right up next to those ties everywhere along the railroad, isn't there? A. Yes, sir. Q. That is the proper way, I believe, that a railroad is built so far as you know, isn't it? A. Yes. \* \* \* Q. You say the section gang keeps a path there for themselves to walk on? A. It is there, yes, sir. Q. On both sides of the right-of-way? A. Yes, that's right. Q. Every place on the railroad you have been? A. No, sir, not every place. Q. Well, all along the right-of-way on that section you worked on? A. Yes; there is a flat surface of dirt other than where the culverts are. Q. Other than where the culverts are? A. Yes. Q. So anytime you come to a culvert there isn't any. Is that right? A. There is not a dirt, flat surface. Q. At any culvert? A. To a certain extent; I mean not like a shoulder is."

Defendant's foreman testified that, "generally speaking," there is a shoulder eighteen inches to three or four feet wide along the outer edge of the ballast. There is no ballast on the shoulder unless "there would be loose rock kicked out. \* \* \* We clean it up if we have a slide." The section men keep the ballast "lined up (approximately) straight."

As stated, defendant-appellant contends the trial court erred in overruling defendant's motion for a directed verdict. It is said there was no proof that an accident and injury could have been reasonably foreseen from the manner in which the drainage culvert was constructed and maintained; and there was no evidence that plaintiff's alleged injury was proximately caused by the method [fol. 444] adopted by the defendant in burning the weeds or that such an injury or other danger could have been reasonably foreseen in the method used by defendant.

As to the issue of negligence—the facts in the instant case

are not like those in *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062, cited by plaintiff-respondent, wherein the employee was ordered to work at a particular place where there was a narrow footing and no guardrail on a bridge eighteen feet above the ground, and the wrench he was required to use, unless disengaged when the doors of a hopper car were opening, was likely to spin with the shaft of the hopper and throw the employee off balance. Defendant was not absolved from its continuing duty to provide the employee with a reasonably safe place to work by the fact that the work there required was fleeting or infrequent. The nature of the task which the employee undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether the employer, in furnishing the employee with that particular place in which to perform the task was negligent. Nor are the facts of the instant case like those in *Kelso v. W. A. Ross Const. Co.*, 337 Mo. 202, 85 S. W. 2d 527, wherein the employee was required to work alternately between the top of a rock pile where he was safe, and on the ground by the rock pile in the performance of duties which distracted his attention from the danger of trucks passing or backing through or into his place of work, and no warning was given or other precaution taken to protect him from the danger. In *Tatum v. Gulf M. & O. R. Co.*, 359 Mo. 709, 223 S. W. 2d 418, cited by plaintiff-respondent, there was no catwalk, platform or guardrail on a trestle so as to guard trainmen against the danger of falling to a creek thirty-four feet below. In *Luthy v. Terminal R. Ass'n of St. Louis, Mo. Sup.*, 243 S. W. 2d 332, there was no light at plaintiff's place of work, and plaintiff working in the dark fell over a black switch [fol. 445] mechanism when attempting to board a car.

As to the issue of causal connection—the mere fact that injury follows negligence does not necessarily create liability—causal connection between negligence and injury is necessary. The test of whether there is causal connection is that, absent the negligent act the injury would not have

occurred. Moreover, in order that negligence be actionable, there must not only be causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury. Foreseeability of injury is sometimes employed as a test of proximate cause; but if it reasonably could have been foreseen or anticipated, that an act of commission or omission was likely to injure someone, then it makes no difference that the manner in which the act did injure someone might not have been foreseen or anticipated and the actor may be held liable for any injury which, after the occurrence, appears to have been a natural and probable consequence of his act. *Kimberling v. Wabash R. Co.*, 337 Mo. 702 85 S. W. 2d 736; *Annin v. Jackson*, 340 Mo. 331, 100 S.W. 2d 872; *Pedigo v. Roseberry*, 340 Mo. 724, 102 S.W. 2d 600; *Mrazek v. Terminal R. Ass'n of St. Louis*, 341 Mo. 1054, 111 S.W. 2d 26; *Gray v. Kurn*, 345 Mo. 1027, 137 S.W. 2d 558; *Rose v. Thompson*, 346 Mo. 395, 141 S.W. 2d 824; *Fassi v. Schuler*, 349 Mo. 160, 159 S.W. 2d 774; *Springer v. Security Nat. Bank Savings & Trust Co.*, Mo. Sup. 175 S.W. 2d 797; *Branstetter v. Gerdeman*, Mo. Sup., 274 S.W. 2d 240.

The principle of the essentiality of proximate causation has been recognized by the Supreme Court of the United States in Federal Employers' Liability Act cases. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444; *Brady v. Southern R. Co.*, 320 U.S. 476, 64 S. Ct. 232; *Reynolds v. Atlantic Coast Line R. Co.*, 336 U.S. 207, 69 S. Ct. 507. As pointed out in *Luthy v. Terminal R. Ass'n of St. Louis*, supra, Mo. Sup., 243 S.W. 2d 332, the *Brady* case (a five to four holding) involved facts arising prior to the 1939 amendment to the Federal Employers' Liability Act. However, the 1939 amendment did not affect the rule that liability must be based on negligence—a proximate cause of the injury. In *Tiller v. Atlantic Coast Line R. Co.*, [fol. 446] supra, the court held that the Act and its amendment of 1939 abolished the post-*Priestly v. Fowler* defenses (the fellow servant-assumption of risk rule) and authorized comparison of negligence instead of barring the employee from all recovery because of contributory negligence. But the Act and the amendment "leave for practi-

cal purposes only the question whether the carrier was negligent *and whether that negligence was the proximate cause of the injury.*" (Our italics.)

In the Brady case, plaintiff's decedent, assisting in a switching movement, was thrown from the step of a gondola car to instant death when the trucks of the car hit "the wrong end" of a closed derailer on the east rail of the switch track. The opposite (west) rail of the switch track was defective. The west rail was so worn on the top and sides that experts were of the opinion it permitted the thrust of the east wheels of the trucks, as they rose over "the wrong end" of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, "nine times out of ten, if the best type" rail was in use. The misuse of the derailer was an act of negligence, but it was mere speculation as to whether that negligence was chargeable to decedent or another. Plaintiff, therefore, could not recover on the theory that defendant was negligent in setting the derailer without warning decedent. As to negligence in using a defective rail—the rail was sufficient for ordinary use, and defendant was not obliged to foresee or guard against misuse of the derailer; although a witness with years of experience as a brakeman recalled instances when trains were improperly backed over a closed derailer. The Supreme Court of the United States was of the opinion that the misuse of the derailer was entirely disconnected from the earlier act of defendant in placing the weak rail in the track. The unsound rail was not a proximate cause of the accident. The mere fact that with a sound rail the accident would not have happened was not enough.

In our case, plaintiff's testimony leaves much unsaid as to the actual condition at the west end of defendant's drain-[fol. 447] age culvert, and as to the place where defendant was stepping when he fell. Plaintiff's testimony at best tends to show the fact that generally there was a level shoulder between the edge of the ballast and the crest of the dump supporting defendant's tracks. This level shoulder was supposed to be kept there so that section men might have a safe place to walk when working. There were flat surfaces across the ends of culverts, but not "like" the shoulders were. Considered from a standpoint most favorable to



plaintiff, it reasonably could be said the flat surface across the west end of the culvert in question was narrower than elsewhere along the shoulder, and the vibration of trains had loosened and shaken down some gravel or crushed rock so as to make an inclined surface down to or near the end of the culvert. Plaintiff's testimony, which we have quoted in question and answer form, *supra*, was support for a conclusion that plaintiff slipped on gravel "right up next to the ties"; however, at another time while testifying, plaintiff said, "I didn't back up east, next to the rails." Even so, the condition of the culvert was not shown to have been unsafe for workmen in the ordinary use of the area in maintaining the tracks, including the firing and attending the firing of "spots" of weeds along the shoulder and incline of the dump. Can it be correctly said that a reasonably careful and prudent person would assume that loose gravel or crushed rocks, shifted down on the shoulder at the culvert by the vibration of trains, would subject section men to an unreasonable hazard, accustomed as section men are to moving over tracks, ties and ballast in their multiple duties in the maintenance of the line? It is established that the standard of care must be commensurate to the dangers of the business. Less diligence is required where the danger is slight than where great. *Frizzell v. Wabash R. Co.*, 8 Cir., 199 F. 2d 153. It is true plaintiff was confronted by an emergency, in a sense; but, as we shall see, it was an emergency brought about by himself.

Nor was there evidence tending to show that the use of the hand torch (in itself) was an unsafe method or a more dangerous method than any other in burning weeds. See [fols. 448-475] and compare *Fore v. Southern Ry. Co.*, 4 Cir., 178 F. 2d 349. Of course, it could be asserted that fire itself is a hazard. But it is not contended that defendant was negligent in starting a fire. And the use of the hand torch in firing the weeds did not make the fire dangerous. Defendant did not start a fire on its right of way and abandon it to sweep at large in changing winds or in swirls of wind caused by passing trains. Defendant had detailed plaintiff to fire the weeds; and, according to his testimony, plaintiff knew it was his primary duty to watch the fire.

It seems to us that the fire—unattended and unwatched as it was—swept northwardly by the wind of the passing



train toward defendant's culvert so that plaintiff (who had left the fire unattended) was obliged to move blindly away and fall, was something extraordinary, unrelated to, and disconnected from the incline of the gravel at the culvert. And now, after the event, we are obliged to say we think plaintiff's injury was not the natural and probable consequence of any negligence of defendant. And if there was negligence in failing to maintain a sufficiently wide path across the culvert or in permitting that path to become covered with crushed rock or gravel, still plaintiff's evidence is completely lacking in probative facts supporting a conclusion that defendant's negligence, in whole or in part, contributed to plaintiff's injury. *Brady v. Southern R. Co.*, supra, 320 U.S. 476, 64 S. Ct. 232; *Atlantic Coast Line R. Co. v. Anderson*, 5 Cir., 221 F. 2d 548; *Chesapeake & O. Ry. Co. v. Burton*, 4 Cir. 217 F. 2d 471; *Gill v. Pennsylvania R. Co.*, 3 Cir., 201 F. 2d 718; *Fore v. Southern Ry. Co.*, supra, 178 F. 2d 349; *Wolfe v. Henwood*, 8 Cir., 162 F. 2d 998; *Seaboard Air Line R. Co. v. Gentry*, Fla., 46 So. 2d 485; *Restatement, Torts*, § 433.

The judgment should be reversed.

• It is so ordered.

Paul Van Osdol, Commissioner.

Coil, C., Concurs.

Holman, C., Concurs.

PER CURIAM: The foregoing opinion by Van Osdol, C. is adopted as the opinion of the court. All of the Judges concur.

[fol. 476] IN SUPREME COURT OF MISSOURI

ORDER OVERRULING MOTIONS FOR MODIFICATION OF OPINION,  
FOR A REHEARING, OR, IN THE ALTERNATIVE, TO TRANSFER  
TO COURT EN BANC—Dec. 12, 1955

Now at this day, the Court having seen and fully considered the motions of the respondent for modification of the opinion in the above entitled cause and for a rehearing herein or, in the alternative, to transfer said cause to the Court en Banc, doth order that said motions be, and the same are hereby overruled.

[fols. 477-478] **RESPONDENT'S MOTION TO STAY MANDATE.  
AND ORDER STAYING MANDATE** (omitted in printing)

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[fol. 479] **Clerk's Certificate to foregoing transcript**  
omitted in printing.

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[fol. 480] **SUPREME COURT OF THE UNITED STATES**

[Title omitted]

**ORDER ALLOWING CERTIORARI. Filed February 27, 1956.**

The petition herein for a writ of certiorari to the  
Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy  
of the transcript of the proceedings below which accom-  
panied the petition shall be treated as though filed in  
response to such writ.

(7983-0)